DEFENDANT #2 had confessed. *Id.* At the same hearing, Juror 7 testified to deny that she had any non-professional relationship with the Marshal. *Id.*

At the second evidentiary hearing, the district court examined Juror 2269. *Id.* at 13. The court found that her testimony represented she did not have a conversation with the alternate juror during deliberations. *Id.* She did not witness an usual relationship between Juror 7 and the Deputy Marshal. *Id.* The trial court declined to question the Deputy Marshal or other jurors.

CO-DEFENDANT #1 moved to overturn the verdict. CLIENT joined in the motion. The district court in examining the motion found that the D.C. Circuit had determined the trial court had "broad discretion to assess the effect of alleged intrusions." *Id.* at 15. The trial court determined the alternate juror was not credible but did not explain how she might have learned about the withdrawn confession. *See Id.* at 17. The district court stated that it had uncovered "no evidence that the [confession] was discussed or considered by the jury, and hence no evidence of any impact the alleged communication had on the jury." *Id.*

DISCUSSION

The three groupings of circuits that follow vary both in the standards applied to lower courts and the extent to which they have considered and addressed investigative requirements. Largely, the circuits have considered requirements of investigation in passing or by implication. It should be of little surprise that the circuits that have considered the issue more frequently and directly have also begun to develop standards that take a closer look to the lower courts' investigations. It is in those circuits that multi-factor tests have developed and been refined and re-defined over series of cases. It is also those circuits that provide the strongest basis for elucidating a split in the law when compared with the D.C. Circuit.

Given the split in the law demonstrated, the question remains which standard would be most beneficial to the client. Because the district court's cursory investigation would be most susceptible to be overturned where a court of review has clearly elucidated standards, the client would be most benefitted by one of the tests used in the two latter sets of circuits identified. The more granular review available in the Eleventh and the Eighth Circuits would be most beneficial to show that the trial judge's investigation fell short of what would assure CLIENT unencumbered access to his due process right via the *Remmer* hearing. Because the Eleventh Circuit's case law focuses most directly on trial court methodology, it is most strongly supportive of a petitioner seeking application of additional oversight as to the method of investigation. But because the Eighth Circuit's standard of review is so stringent, it is additionally beneficial in that – where trial court investigation is reviewed – it is most likely to be examined closely by the appellate court. It would be best, then, for CLIENT to look to the doctrines of these two circuits.

A. SOME COURTS LEAVE TO THE TRIAL TRIBUNALS DISCRETION TO DETERMINE THE METHOD OF FACTUAL INQUIRY INTO THE THIRD-PARTY JURY CONTACTS

D.C. Circuit

The D.C. Circuit is among those preserving great discretion for trial judges in post-conviction hearings called to resolve questions of improper jury contacts. In the D.C. Circuit, "cases say clearly that the trial court has broad discretion over the 'methodology' of inquiries into third-party contacts with jurors." *United States v. Williams-Davis*, 90 F.3d 490, 498 (D.C. Cir. 1996) (citing *United States v. Williams*, 822 F.2d 1174, 1190 (D.C. Cir. 1987)). The circuit has "explicitly rejected any automatic rule that jurors are to be individually questioned." *Williams-Davis*, 90 F.3d at 499 (citing *Williams*, 822 F.2d at 1190 n.162). The circuit has previously enumerated relevant factors to be considered in evaluating juror bias. *Williams*, 822

F.2d at 1188–89 ("An assessment of juror bias requires consideration of a number of factors, including the nature of the communication, the length of the contact, the possibility of removing juror taint by a limiting instruction, and the impact of the communication on both the juror involved and the rest of the jury."). But it considers the trial court to be "obviously … the tribunal best qualified to weigh" those factors. *Id.* at 1189. And, so long as the district court makes enough of an inquiry to lead to a "reasonable judgment that there has been no prejudice, on an assumption as to the facts favorable to defendants' claim," it has satisfied its duties. *Williams-Davis*, 90 F.3d at 499.

The issue here remains nearly entirely in the hands of the district court. The D.C. Circuit has considered the issue only twice. It provided a list of factors to be considered. In the more than three decades since, the circuit has made clear that it will not bind the trial courts to those factors. It has never since applied them against the lower court. The standard, in short, is highly deferential. The district court in CLIENT's case correctly stated the D.C. Circuit rule and referenced the relevant factors in its opinion. On direct appeal the circuit rejected a defense argument that the court should have been obligated to examine the Marshal at the center of the controversy, all the jurors, and the phone records of jurors who testified. *CIRCUIT COURT CITATION*. The circuit determined that the district court was well within its "great discretion." *Id.* at 155. As the rulings in this case indicate, the D.C. Circuit standard is not favorable.

First Circuit

The First Circuit, like the D.C. Circuit, leaves great discretion with the trial court. *See United States v. Boylan*, 898 F.2d 230, 258 (1st Cir. 1990). Only in "egregious circumstances" might a trial court apply a rebuttable presumption that the defense suffered prejudice by jury exposure to third-party communication. *United States v. Bradshaw*, 281 F.3d 278, 288 (1st Cir.

2002). Otherwise, a claim of jury taint "must be judged by more conventional standards." *Id.* at 289. Where jury taint is alleged after a verdict has been delivered, have conducted harmless error review. *Id.* at 289 n.6 (citing *Boylan* 898 F.2d at 262). The scope of the inquiry "should be limited to only what is absolutely necessary to determine the facts with precision." *Boylan* 898 F.2d at 258 (quoting *United States v. Ianniello*, 866 F.2d 540, 544 (2d Cir.1989)). "So long as the district judge erects, and employs, a suitable framework for investigating the allegation and gauging its effects, and thereafter spells out his findings with adequate specificity to permit informed appellate review … his 'determination that the jury has not been soured deserves great respect [and] ... should not be disturbed in the absence of a patent abuse of discretion.'" *Boylan*, 898 F.2d at 258 (quoting *Hunnewell*, 891 F.2d at 961).

The standard in the First Circuit is – like in the D.C. Circuit – highly deferential to the trial court. The First Circuit requirement of a "suitable framework" does not reach much further than the requirement of an inquiry allowing a "reasonable judgment" in D.C. However, in dicta, the First Circuit has previously left favorable indications for a client in CLIENT's position.

In *Boylan*, the Circuit considered a case in which jurors were exposed to a "questionable magazine article" indicating that defense counsel had represented "[e]very troubled mobster in town." *Boylan*, 898 F.2d at 258 n.17. All jurors and alternates were interviewed by the District Court, though not under oath. *Id.* at 258. The trial court determined that the jury had not been compromised. *Id.* And the Circuit held that this was a sufficient inquiry. *Id.* The circuit, in arriving at its conclusion, reasoned *inter alia* that "[a]part from the jury, there were no other witnesses to be examined." *Id.* at 259.

The *Boylan* facts are notably distinguishable from CLIENT's case on two bases: first, in CLIENT's case, only two jurors were questioned. And second, in CLIENT's case, there *was*

another non-juror witness to be examined: the Marshal alleged to be acting with impropriety. These two factual distinguishments are highly notable given the circuit's reasoning that the *Boylan* trial court had examined all the witnesses it could. Although the standard of review stemming from *Boylan* is similar to the D.C. Circuit's standard, the reasoning underpinning *Boylan* is stricter. It is possible that a court applying the *Boylan* standard to CLIENT's facts might determine that the trial court's determination was not made based on a suitable framework.

B. Other courts set out generalized categories of investigation that comprise a proper inquiry into the jurors' extrinsic contacts

Eleventh Circuit

In the Eleventh Circuit, trial courts are required to conduct full investigations into allegations of alleged jury misconduct creating exposure to extrinsic evidence. Where the allegation was that the improper influence was in connection with jury misconduct, the trial judge "must conduct a *full investigation* to ascertain whether the alleged jury misconduct actually occurred; if it occurred, he must determine whether or not it was prejudicial." *United States v. Brantley*, 733 F.2d 1429, 1439, 1440 n.20 (11th Cir. 1984) (quoting *United States v. McKinney*, 429 F.2d 1019, 1026 (5th Cir.1970), cert. denied, 401 U.S. 922 (1971)). The circuit has indicated that a full investigation should generally include the questioning of at least the accuser and the possible wrongdoers involved, if not all jurors. *See Brantley*, 733 F.2d at 1440, 1440 n.20 (noting that all but one of "numerous cases" cited by a party arguing against appellate court review of investigative procedure featured trial court questioning of "every juror about the possible jury misconduct or outside influence at issue").

When considering a trial court's decision for abuse of discretion, the circuit considers the totality of the circumstances, including certain enumerated factors. *United States v. Ronda*, 455 F.3d 1273, 1300 (11th Cir. 2006). "The factors we consider include: (1) the nature of the

extrinsic evidence; (2) the manner in which the information reached the jury; (3) the factual findings in the district court and the manner of the court's inquiry into the juror issues; and (4) the strength of the government's case." *Id.* (citing *McNair v. Campbell*, 416 F.3d 1291, 1307–08 (11th Cir. 2005)); *see also United States v. Dortch*, 696 F.3d 1104, 1110 (11th Cir. 2012) (applying the *Ronda* test). But there is "no magic formula that the trial court must follow in conducting the inquiry. Rather, it must use whatever inquisitorial tools are necessary and appropriate." *United States v. Bolinger*, 837 F.2d 436, 440 (11th Cir. 1988) (per curiam).

The Eleventh Circuit rule is relatively favorable to the client. The string of "numerous cases" – *Brantley*, 733 F.2d at 1440, 1440 n.20 – involving the questioning of all jurors might support a finding that the investigation in CLIENT's case was not complete. Additionally, application of the circuit's factor test would likewise favor CLIENT. The first factor would weigh in favor of the defense. The allegations are that a Marshal responsible for overseeing the jury a) provided information to a juror about a defendant's rescinded guilty plea and b) had an inappropriate relationship with a juror. A juror in such circumstances would likely face overwhelming temptation to arrive at a finding of guilt on the basis of the extrinsic evidence rather than the evidence presented at trial. The extrinsic evidence therefore is indicative of highly prejudicial misconduct. The second factor likewise favors the defense. The information is alleged to have reached the jury via two phone calls. The existence of those calls could have been quickly verifiable by way of phone records. The third factor weighs in favor of the defense as well: the court's factual findings did not account for basic questions (if the alternate juror's account of the Marshal's conduct was not credible, how did she learn of the prior guilty plea?) and the inquiry did not include investigation of those questions (by, for instance, questioning of the Marshal). The manner of inquiry and the findings it produced were weak. The fourth factor,

though, weighs generally in favor of the government. The conspiracy alleged was massive. However, CLIENT's tenuous connection to the drug case (as evidenced by the indictment's charge of a single conspiracy count without a corresponding substantive count) could somewhat undermine the weight of this final factor. Ultimately, it is plausible given the lack of "magic formula" that a court applying the Eleventh Circuit standard might find CLIENT did not receive the investigation he was due and declare a mistrial.

Fifth Circuit

Similarly, in the Fifth Circuit, trial courts are required to investigate allegations of juror access to extrinsic evidence by application of a multi-factor test. *See, e.g.*, *United States v. Davis*, 393 F.3d 540, 549 (5th Cir. 2004) (citing *United States v. Ruggiero*, 56 F.3d 647, 652 (5th Cir. 1995)); *accord United States v. Betner*, 489 F.2d 116, 119 (5th Cir. 1974) ("[W]hen jury misconduct is alleged in the defendant's motion for new trial, the trial judge has a duty to take the following actions: he *must conduct a full investigation* to ascertain whether the alleged jury misconduct actually occurred[.]") (emphasis added). The relevant test sets out three factors to for assessing an allegation of improper influence. *Davis*, 393 F.3d at 549. "[A] district court must examine the content of the material, the way in which it was brought to the jury's attention, and the weight of the evidence against the defendant." *Id.* (citing *Ruggiero*, 56 F.3d at 652 (5th Cir. 1995)); *see also*, *e.g.*, *United States v. Luffred*, 911 F.2d 1011, 1014 (5th Cir. 1990), *United States v. Gonzales*, 121 F.3d 928, 945 (5th Cir. 1997).

So long as the district court has undertaken such an analysis, the circuit will overturn only for an abuse of discretion. *Ruggiero*, 56 F.3d at 653 (5th Cir. 1995) (noting that the trial court's finding should be granted "great weight"). *See also United States v. Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998) (noting a "longstanding recognition of the trial court's considerable discretion in

investigating and resolving charges of jury tampering"). And "the court's 'ultimate inquiry' must be whether the intrusion will affect the jury's deliberations and verdict." *Id.* (quoting *United States v. Olano*, 507 U.S. 725, 739 (1993)).

The Fifth Circuit's three-factor test tracks closely the four factors applied in the Eleventh Circuit. However, the distinction is relevant. The Fifth Circuit test does not itself include a factor directly assessing the district court's investigation. It instead captures such lines of inquiry by way of the overlaid abuse of discretion standard of review. The lack of a factor directly addressing the trial court's performance cuts against a favorable outcome for CLIENT. And – in contrast with the Eleventh Circuit – the Fifth Circuit does not have a string of cases insinuating the need to question all jurors. Without these features, the Fifth Circuit test might well have resolved CLIENT's case in favor of the government. Despite its similarity to the favorable Eleventh Circuit, then, the Fifth Circuit's test is likely undesirable for the client.

C. STILL OTHER CIRCUIT COURTS DELINEATE FACTORS REQUIRED FOR CONSIDERATION AND PRECISELY CALIBRATE THE SCALES TO BE USED BY THE TRIAL COURT

Eighth Circuit

The Eighth Circuit goes even farther than its aforementioned sister circuits in setting out specific factors to be considered and reviewing the trial courts' application of those factors to ensure they receive the appropriate weight. In determining whether the government has overcome the rebuttable *Remmer* presumption, courts are directed to apply an objective test and "weigh adequately" its factors. *United States v. Blumeyer*, 62 F.3d 1013, 1017–18 (8th Cir. 1995).

> The relevant considerations include (1) whether the extrinsic evidence was received by the jury and the manner in which it was received; (2) whether it was available to the jury for a lengthy period of time; (3) whether it was discussed and considered extensively by the jury; (4) whether it was introduced before a verdict was reached and, if so, at what point during the deliberations was it introduced;

> and (5) whether it was reasonably likely to affect the verdict, considering the strength of the government's case and whether it outweighed any possible prejudice caused by the extrinsic evidence.

Id.

Where a trial court fails to accord each factor the proper weight or fails to consider a factor altogether, the circuit court may overturn on a finding of clear error. *See Blumeyer*, 62 F.3d at 1018.

Such a stringent standard of review as applied in the Eighth Circuit is generally preferable for any client seeking their conviction overturned on appeal. Additionally notable to CLIENT's case is the nature of the five factors applied in the Eighth Circuit. In particular, the first and second factors are illustrative. These factors, couched within a clear error standard, require the trial court to determine if the extrinsic evidence was in fact received, how it was received, and for how long it was available to the jury. There is no requirement specified that the trial court interview the jury. However, it is highly plausible that a circuit might determine that failure to interview the entirety of the jury panel, failure to interview the Marshal in question, and failure to review telephone records fell short of the requisite standard. The remaining factors follow from findings of shortcomings captured by the first two factors. It's simply not possible, for instance, to know whether extraneous information was discussed by the jury without first determining whether the information was received by the jury. It is clear that CLIENT would have benefitted from application of the Eighth Circuit's standard of review.

Ninth Circuit

The Ninth Circuit applies a five-factor test within a heightened evidentiary context as well as standard of review. The factors include:

> (1) whether the extrinsic material was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the jury

> discussed and considered it; (4) whether the extrinsic material was introduced before a verdict was reached, and if so, at what point in the deliberations it was introduced; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the introduction of extrinsic material affected the verdict.

Bayramoglu v. Estelle, 806 F.2d 880, 887 (9th Cir. 1986) (citing *Paz v. United States*, 462 F.2d 740, 746 (5th Cir.1972)).

No one factor is dispositive. *United States v. Montes*, 628 F.3d 1183, 1187 (9th Cir. 2011). So long as there is enough information to analyze the five factors, the district court may decline to take live juror testimony at a hearing on a motion for a new trial. *See id.* at 1188.

The circuit also recognizes additional factors that can be used to suggest "the potential prejudice of the extrinsic information was diminished in a particular case." *Id.* (quoting *Jeffries v. Wood*, 114 F.3d 1484, 1491-92 (9th Cir. 1997) (en banc) (overruled on other grounds by *Lindh v. Murphy*, 521 U.S. 320 (1997))). "These factors include: whether the prejudicial statement was ambiguously phrased; whether the extraneous information was otherwise admissible or merely cumulative of other evidence adduced at trial; whether a curative instruction was given or some other step taken to ameliorate the prejudice; the trial context; and whether the statement was insufficiently prejudicial given the issues and evidence in the case." *Jeffries*, 114 F.3d at 1491–92 (footnotes omitted).

The ultimate question to be determined by the trial court is "whether it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict." *Bayramoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986) (quoting *United States v. Bagley*, 641 F.2d 1235, 1241 (9th Cir.)) (internal quotations omitted) Where the case trial court's determination is appealed, the appellate court conducts "an independent review of the alleged juror misconduct, but remain[s] mindful of the trial court's conclusions." *United States v. Bagnariol*, 665 F.2d 877, 885 (9th Cir. 1981).

The focus of the Ninth Circuit is – like the Eighth – directed somewhat more toward the trial court's areas of inquiry and directed less toward the method of inquiry (in contrast to, for instance, the Eleventh Circuit). However, the highly specific requirements for areas of factual inquiry create investigative requirements that, given CLIENT's facts, imply certain necessity of methodology. Much like in the Eighth Circuit, some of the Ninth Circuit's requirements indicate the need for greater investigation than was conducted in CLIENT's hearing. Because of the highly specific factual questions that the *Bayramoglu* factors rely upon, the Ninth Circuit's standard could not be resolved in CLIENT's case without interviewing the jurors and the Marshal. This is particularly notable given that the trial court must make its findings to a reasonable doubt standard. And, given the appellate court's mandate to conduct "independent review," it seems altogether unlikely that the district court's holding in CLIENT's instance would be upheld by a Ninth Circuit panel.

CONCLUSION

The courts of appeals have begun to develop divergent case law regarding both the implicit and explicit investigative requirements binding on a district court conducing a *Remmer* hearing. The circuits are also greatly divergent in the extent to which the issue has been identified and developed. For that reason, the Supreme Court may well determine that this issue is not yet ready for review. However, juxtaposing the Eighth and Ninth Circuits' practices with those of the D.C. Circuit's illuminate why this issue might be deemed interesting to the Justices. Although all three circuits are conducting their hearings in light of the Due Process interests elucidated in *Remmer* and its progeny, the procedural protections and standards of review could hardly be more divergent in nature. This contrast should concern the Supreme Court. Because this issue bears so directly on the client's factual circumstances, we should present it in a petition

for certiorari. The most beneficial standard for the client would be a combination of those applied in the Eleventh and Eighth Circuits. Most particularly: the explicit call for investigation in the Eleventh Circuit and the substantial factual findings necessary in the Eighth Circuit would result in an ideal standard on remand for CLIENT.

Applicant Details

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Date of BA/BS	**May 2018**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 17, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Review of Law & Social Change**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 12, 2023

The Honorable Juan R. Sánchez
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Chief Judge Sánchez:

I am a rising third-year law student at New York University School of Law, where I am a Senior Articles Editor for the *Review of Law & Social Change*. I am applying for a clerkship in your chambers for the 2024-2025 term, and any subsequent term. I am particularly interested in clerking for you given your background in direct legal services and public defense. As an aspiring public defender and civil rights litigator who thrives in dynamic workplaces, I believe I would make a valuable addition to your chambers.

Since coming to NYU Law, I have spent my time honing the legal research and writing abilities that I believe will make me an invaluable judicial clerk. During my 1L summer clerkship with the Orleans Public Defenders, I learned how to quickly draft successful motions and thoroughly review thousands of pages of discovery, summarizing them in comprehensive discovery digests. My work with the NYU-Yale American Indian Sovereignty Project allowed me to sharpen my substantive cite-checking skills as I helped prepare an amicus brief discussing the history of the trust doctrine in *Arizona v. Navajo Nation*, which is pending before the Supreme Court. Before law school, I worked for two years at the Brennan Center for Justice. As the Special Assistant to the Justice Program director, I learned how to write reports and speeches quickly yet adeptly, adapting my tone and style to best meet the needs of my employer. Lastly, my Fulbright Research Fellowship taught me how to manage projects independently and work with diverse constituents.

Enclosed please find my resume, law school transcript, and writing sample. Written recommendations will follow from:

- Congressman Hakeem Jeffries and Professor Debo Adegbile, with whom I took Professional Responsibility (debo.adegbile@wilmerhale.com and (212) 965-6717).
- Professor Kim Taylor-Thompson, Professor of Law Emerita at NYU School of Law, with whom I took Criminal Law (kim.taylor.thompson@nyu.edu and (914) 720-5827).
- Ms. Abbee Cox, Staff Attorney at the Orleans Public Defenders, and my former supervisor (abbeecox@gmail.com and (580) 704-6865).

Please let me know if I can provide any additional information. I can be reached by phone at (917) 993-4345, or by email at rs6700@nyu.edu. I would welcome the opportunity to interview with you and look forward to hearing from you soon.

Respectfully,

/s/

Ruth Sangree

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EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Candidate for J.D., May 2024
Honors: *Review of Law & Social Change*, Senior Articles Editor
Activities: Disability Rights and Justice Clinic, Student Advocate (Fall 2023)
OUTLaw, Public Interest Professional Development Chair
Defender Collective, Board Member

MOUNT HOLYOKE COLLEGE, South Hadley, MA
B.A., History and Politics, May 2018

EXPERIENCE

BROOKLYN DEFENDER SERVICES, Brooklyn, NY
Legal Intern, Integrated Defense Practice, June 2023 – August 2023
Interview clients, prepare client affidavits, draft motions, and research novel legal issues in family and criminal law. Help attorneys prepare for hearings by preparing witnesses, drafting direct and cross-examinations, and reviewing case records.

PROFESSOR KENJI YOSHINO, NYU SCHOOL OF LAW, New York, NY
Research Assistant, January 2023 – May 2023
Contributed to research-backed projects to advance the law school's efforts on diversity and inclusion.

NYU-YALE AMERICAN INDIAN SOVEREIGNTY PROJECT, New York, NY
Student Researcher, September 2022 – Present
Provide research and drafting support for amicus briefs relating to federal Indian law in cases before the Supreme Court.

PUBLIC JUSTICE, Washington, DC
General Litigation Extern, September 2022 – December 2022
Assisted with developing cases in federal courts focused on ending the criminalization of poverty. Authored a memorandum on challenges to court-imposed counsel fees via the Excessive Fines Clause. Drafted FOIA requests to federal agencies.

ORLEANS PUBLIC DEFENDERS, New Orleans, LA
Summer Law Clerk, May 2022 – August 2022
Drafted successful bond reduction and pretrial motions. Reviewed and summarized discovery documents and body camera footage. Assisted attorneys at arraignments and substantive motions hearings. Coordinated post-release services for clients in collaboration with the office's client services team. Interviewed and provided support to currently incarcerated clients. Organized a fundraiser for the office's client book fund.

NYU PAROLE ADVOCACY PROJECT, New York, NY
Parole Advocate, February 2022 – Present
Support clients as they prepare for appearances before the New York State Parole Board. Assemble Parole Packets, write advocacy letters, conduct mock interviews, and connect clients to re-entry services and appellate representation.

FULBRIGHT KOREA, Seoul, South Korea
Fulbright Research Scholar, February 2021 – December 2021
Conducted an independent research project on the South Korean "comfort women" (wartime sexual slavery) redress movement and its impact on broader South Korean feminist activism, vis-à-vis paths for legal recourse and restorative justice.

BRENNAN CENTER FOR JUSTICE, New York, NY
Special Assistant to the Director, Justice Program, June 2018 – July 2020
Provide research, drafting, and cite-checking support for major Program publications focused on criminal justice reform. Wrote daily briefings on national and local developments in criminal legal reform. Wrote speeches and prepared talking points for Director to use in national media appearances. Authored blogs and op-eds for the Center's website and external publications. Developed a dashboard tracking COVID-19's impact on incarcerated individuals.

ADDITIONAL INFORMATION

Conversational in Korean. Enjoy baking and hiking.

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Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2020

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Shirley Lin			
Criminal Law	LAW-LW 11147	4.0	B
Instructor: Kim A Taylor-Thompson			
Torts	LAW-LW 11275	4.0	B
Instructor: Mark A Geistfeld			
Procedure	LAW-LW 11650	5.0	B
Instructor: Troy A McKenzie			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: Reading Legal News			
Instructor: Helen Hershkoff			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Edith Beerdsen			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B
Instructor: Samuel J Rascoff			
Contracts	LAW-LW 11672	4.0	B
Instructor: Clayton P Gillette			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Catherine M Sharkey			
Criminal Procedure: Police Practices	LAW-LW 12697	4.0	B
Instructor: Barry E Friedman			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	A
Instructor: Hakeem Sakou Jeffries Debo Patrick Adegbile			
Evidence	LAW-LW 11607	4.0	B
Instructor: Daniel J Capra			
Directed Research Option B	LAW-LW 12638	1.0	A
Instructor: Maggie Blackhawk			
Directed Research Option B	LAW-LW 12638	1.0	IP
Instructor: Helen Hershkoff			
Domestic Violence Law Seminar	LAW-LW 12718	2.0	A-
Instructor: Emily Joan Sack			
Reproductive Rights and Justice: A Comparative Perspective Seminar	LAW-LW 12768	2.0	A-
Instructor: Chao-ju Chen			

	AHRS	EHRS
Current	12.0	11.0
Cumulative	42.0	41.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Employment Law	LAW-LW 10259	4.0	B
Instructor: Cynthia L Estlund			
Racial Justice Colloquium	LAW-LW 10540	2.0	A
Instructor: Deborah Archer Vincent Southerland			
Examining Disability Rights and Centering Disability Justice	LAW-LW 10983	2.0	A
Instructor: Prianka Nair			
Constitutional Law	LAW-LW 11702	4.0	B+
Instructor: Peter Milo Shane			
Directed Research Option B	LAW-LW 12638	2.0	A
Instructor: Maggie Blackhawk			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	56.0	55.0

Staff Editor - Review of Law & Social Change 2022-2023

End of School of Law Record

Unofficial

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

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May 26, 2023

To whom it may concern:

We write to provide our highest recommendation for Ruth Sangree, who has applied to a judicial clerkship in your chambers. We had the privilege to teach Ruth last semester in a seminar titled *Lawyers and Leaders: Professional Responsibility in Government and Public Interest Lawyers*. Ruth's performance in the class was superb. She was a pleasure to teach, and we are confident she would be just as much of an asset to have in chambers.

In class, Ruth regularly made insightful and thought-provoking comments, and she showed a true passion for the subject. It is not every day that a student shows such engagement in a professional responsibility course. But she did. From the start, she showed that she was not only reading the materials but also giving serious thought to her own positions, reflecting on any preconceived notions that she might have had coming in. She was open-minded but also willing to take positions on what she thought was right. Her eagerness was matched by humility and a willingness to listen to others, to incorporate their views, and to consider how they might affect her thinking. It's not just that Ruth showed that she will make an excellent lawyer; it's also that she made the class more fun and generative. She was a joy to teach.

Given her consistent and excellent contributions throughout the semester, we were not surprised that her final paper—on the pitfalls and potentials of government attorneys engaging in zealous advocacy—was brilliant. Her argument—that the model rules of professional conduct are sometimes an odd fit with the specific requirements of the responsibilities of prosecutors and public defenders—was nuanced. As the paper made clear, she has a keen analytical mind. Her writing is also strong and clear. Ruth did not dodge some of the harder questions that her argument raised; instead she addressed them head-on, thoughtfully but forcefully.

Ruth's personal characteristics also speak to why you would benefit from her service as a clerk. It was clear her classmates were very fond of her. We expect that your other clerks would feel the same way. She is also up to the task of dealing with some of the hard questions she will confront over the course of her clerkship; throughout the semester, she showed that she was more than capable of thinking through tough, knotty questions.

In sum, Ruth's performance in our course speaks to why you should offer her a clerkship position. She's smart, and she combines her intelligence with an eagerness and a willingness to learn and to grow. She's also a strong writer, with a keen ability to communicate her arguments thoughtfully and effectively. Ruth will be an excellent clerk, and she will go on to do significant things in our profession.

Respectfully,

Hakeem Jeffries & Debo P. Adegbile

NYU LAW

KIM A. TAYLOR-THOMPSON
Professor of Clinical Law

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June 12, 2023

RE: Ruth Sangree, NYU Law '24

Your Honor:

It is with such pleasure that I write on behalf of Ruth Sangree, who has applied for a judicial clerkship. Ruth is one of those individuals whom you know has both the determination and passion to push boundaries and to make an impact in the profession. Her commitment to fairness and social justice forms the basis of all that she does. I have known Ruth since her first semester in law school. I found her to be curious, capable of seeing subtle connections. She was hard working and committed to excellence. I recommend her to you without hesitation.

Ruth offers the precise mix of talent and passion that one would expect from a first-rate young lawyer. I taught Criminal Law and it was everyone's first experience with online classes. Ruth's questions and insights during class demonstrated her eagerness to think deeply about critical questions. While many students are reluctant to speak up in their first semester, Ruth became one of the students I felt comfortable calling on because her answers and her questions routinely advanced and elevated the classroom discussion. She was an essential contributor in class discussions. I came to know Ruth well over that semester. I found that she not only enjoyed grappling with doctrine, but she also welcomed the opportunity to challenge conventional thinking and to question assumptions that she may have held when she entered law school. She quite comfortably and capably engaged with a wide range of materials that included cases, legal scholarship as well as interdisciplinary materials focused on social science and neuroscience. Even when the issues that we addressed had complex legal, social and political dimensions, she easily identified the key issues and carefully crafted arguments and positions that help to make sense of the complexity.

Ruth consistently brings clarity of thought to her work. She approaches her work with a high degree of care and creativity that gives you confidence that she will work hard to understand an issue and its nuances. When you challenge her to think hard about hard issues, she gives you the benefit of a sharp, critical mind. She not only excels in her ability to digest and grasp interdisciplinary materials, but she utilizes her analytical skills to raise probing questions. And, now, as a staff editor of NYU's Review of Law and Social Change journal, she has chosen to focus on legal issues that might contribute to questions of social justice.

Perhaps what sets Ruth apart is the time she spent abroad. After her first semester at the law school, Ruth opted to accept a Fulbright that gave her the opportunity to travel to Korea. This was a courageous choice – to interrupt her law school education, to leave the comfort of being part of a cohort of law students, to deepen her understanding of human rights more broadly. Her research project took a critical look at efforts to redress harms experienced by South Korean "comfort women." While she was conducting the research abroad, she stayed in contact with me and I loved watching the evolution of her thinking and insights. She not only began to understand both the cultural concerns and nuances, but she was also able to see parallels in the US. Ruth chooses to look at issues that others might be tempted to see as too tough, too intractable to tackle, and she rolls up his sleeves. She is a gifted student with an endlessly curious mind.

I hope that you will give her the opportunity to work with you and I am confident that you will find her work to be outstanding.

Sincerely,

Kim Taylor-Thompson

Kim A. Taylor-Thompson

ORLEANS PUBLIC DEFENDERS
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Dear Judge:

My name is Abbee Cox, and I'm a current public defender and former clerk. I clerked for the Honorable Pamela A. Harris of the U.S. Court of Appeals for the Fourth Circuit (2017 to 2018) and the Honorable Jon S. Tigar of the U.S. District Court for the Northern District of California (2018 to 2019), before joining the Orleans Public Defenders as a staff attorney in fall of 2019.

These experiences have given me insight into what one needs to succeed as a clerk, and especially as a clerk bound for a career serving the public interest. In light of this insight, I am humbled to have the opportunity to recommend Ruth Sangree for a clerkship in your chambers. Simply put, Ruth is a shining star, destined to become an incredible public interest lawyer. I am confident that she would be an invaluable addition to any workplace, and she is particularly well-suited to the challenges and opportunities presented by a federal judicial clerkship.

I got to know Ruth when she was assigned to work with me for her clerkship at the Orleans Public Defenders (OPD) in the summer of 2022. Generally, OPD assigns a pair of clerks to a pair of attorneys, so that the clerks get a diversity of assignments, as well as the opportunity to observe and learn from different advocacy styles. The unspoken rationale is to try to ensure that all lawyers get at least one clerk who will make their lives easier instead of harder. Because of course, some clerks are more helpful than others—some require a lot of hand-holding and re-writing to make it through even simple assignments, while others are able to hit the ground running and make real contributions to their attorneys' perpetually unmanageable workloads. In a resource-strained jurisdiction where caseloads far exceed ABA standards for indigent defense, a good clerk can make the difference between effective and ineffective assistance of counsel, at least for the few precious weeks that we are lucky to enough to benefit from their help.

Ruth Sangree was not only a "good" clerk, she was an *excellent* clerk. I was constantly bragging to colleagues about Ruth's impeccable work product, and other lawyers who had the opportunity to interact with her that summer — whether in trainings, small group practice sessions for trial advocacy skills, or simply in passing in the courthouse or break room — would tell me with no small amount of jealousy that I had "won the clerk lottery." In fact, Ruth developed such an excellent reputation around OPD that, on multiple occasions over her too-short tenure with us, other lawyers sought me out to see if they might be able to "borrow" her for a while. All too aware of the stack of assignments I had already loaded her down with, I would tentatively ask Ruth if she had bandwidth for anything else. She never hesitated to enthusiastically accept. By the end of her two and half months with us, whenever any of our lawyers found themselves in a jam, needing exceptional assistance on a tight turnaround (a frequent occurrence in our chaotic courthouse), they knew Ruth Sangree was the first person they should ask.

ORLEANS PUBLIC DEFENDERS

The range of work Ruth did for me mirrors the remarkable breadth of tasks public defenders must juggle. Some of these tasks require highly-attuned interpersonal skills, while others demand a sharp analytical mind and robust legal-research-and-writing chops. Ruth excelled in every one of these respects. Indeed, I struggle to think of any to-do on my constantly expanding list that I didn't feel Ruth could already do as well or better than me, as a lawyer with three years of practice under my belt. Ruth's influence has greatly improved my advocacy, even long after her departure. Though her capacity is seemingly endless, my space in this letter is limited. So, with apologies for the run-on sentence, a sample of Ruth's contributions: She visited and interviewed numerous incarcerated clients; drafted successful bond reduction motions that, against great odds, freed some of those clients; worked with OPD's client services division to connect folks with reentry services; created thorough and thoughtful investigation plans; reviewed hundreds of hours of body-cam footage and thousands of pages of discovery (summarizing them in discovery digests that were without a doubt the best I've ever seen—in equal parts comprehensive and concise); conducted creative and wide-ranging research on novel legal issues; and made insightful edits to substantive motions, including multiple successful motions to quash.

Somehow, Ruth also managed to find time to observe court on a near-daily basis. Then, in her "spare time," she organized her fellow clerks to put on a wildly successful fundraiser, raising over $5000 for OPD's client welfare fund. This allows attorneys to send hygiene items and books to our incarcerated clients, affording them a silver of dignity in a system hellbent on denying the same. I imagine that, with her characteristic humility, Ruth might describe this initiative as a group effort, and it undoubtedly was. But equally unquestionable is the fact that Ruth spearheaded it, and that it never would have happened without her unobtrusive, yet compelling leadership style. Ruth is the type of person who other, less capable peers might understandably feel some degree of envy around—but for the fact that she is every bit as kind, friendly, and down-to-earth as she is whip-smart and exceedingly competent. As Your Honor will no doubt observe if you get the chance to interview her, Ruth Sangree is a very difficult person to dislike.

During my tenure at OPD, I've supervised around ten law clerks, and as a clerk in the Harris and Tigar chambers, I worked closely with many college and law school interns—several of whom have gone on to secure full-time federal clerkships after graduation. Among this illustrious group, Ruth is without a doubt the best intern or clerk I have been lucky enough to supervise.

In sum, Ruth Sangree is more than equipped to thrive as a judicial clerk and member of the bar. Her future clients are exceedingly lucky, as is her future judge. I would have loved to have Ruth as a co-clerk, and I am thrilled to welcome her into the profession as a peer. I give her my highest recommendation. Should Your Honor have any questions, I am humbly at your service.

Sincerely,

Abbee B. Cox

Abbee B. Cox
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WRITING SAMPLE COVER SHEET

The following memorandum was completed during my Fall 2022 externship with Public Justice. I have secured permission to use the memo as a writing sample, though some identifying information has been redacted. My supervisor reviewed an initial outline of the memorandum.

TO: Public Justice Supervisor

FROM: Ruth Sangree

DATE: November 29, 2022

RE: Applying the Excessive Fines Clause in a Juvenile Delinquency Context

1. Summary

You asked me to research if courts have applied the Excessive Fines Clause ("EFC") in juvenile delinquency proceedings, in Michigan or elsewhere. I could not find any relevant caselaw in Michigan or the Sixth Circuit that discusses the Excessive Fines Clause in juvenile delinquency proceedings, specifically. However, other jurisdictions, namely California and Alaska, have discussed the Excessive Fines Clause in a juvenile justice context. You also asked whether courts had applied the "fundamental fairness" test to the Excessive Fines Clause to determine whether the Excessive Fines Clause applies in juvenile court. I could not find caselaw that applied the "fundamental fairness" test to the Excessive Fines Clause in the juvenile context, specifically.

2. Excessive Fines Clause in the Michigan Context

a. The Michigan Constitution's Excessive Fines Clause

The Michigan Constitution has a provision that mirrors the federal Excessive Fines Clause. Section 16 of the Michigan Constitution states that "[e]xcessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained."[1] In *People v. Antolovich*, the Michigan Supreme Court laid out several factors for analyzing whether a law violates Section 16.[2] In *Antolovich*, the

[1] MI. CONST. art. I, § 16 (West).
[2] 207 Mich. App. 714, 717; 525 N.W.2d 513, 515 (1994) (articulating a test that weighed several factors, including: the object designed to be accomplished, the importance and magnitude of the public interest, the circumstances and nature of the act for which it is imposed, the preventive effect of a particular kind of crime, and, in some instances, the defendant's inability to pay).

court found that the trial court did not have the authority to impose court costs on the defendant.[3] The court declined to apply the federal Excessive Fines Clause, but found the fine in question excessive under the state constitution, after articulating a balancing test for analyzing the relevant state constitutional provision.[4]

In the past two decades, the Court of Appeals of Michigan has called *Antolovich* into question. In *People v. Lloyd*, the Court of Appeals of Michigan considered whether a defendant had received meaningful notice of an order requiring payment of attorney fees.[5] The defendant, citing *Antolovich*, argued that the trial court had lacked authority to impose court costs.[6] The court denied the defendant's claim, and said that the *Antolovich* decision would not govern over a plain-language analysis of MCL 769.1k and MCL 769.34(6), which expressly empowered sentencing courts to order defendants to pay court costs.[7] The court's reasoning largely rested on *People v. Dunbar*, in which the Court of Appeals of Michigan had held that consideration of a defendant's ability to pay does not require a specific formality, and that the sentencing court only needs to "provide a general statement of consideration regarding the [defendant's] ability to pay."[8] Notably, not long after *Lloyd* was announced, *Dunbar* was overruled in *People v. Jackson*.[9] Furthermore, in 2019, the Court of Appeals of Michigan stated that, regardless of *Lloyd*, they were still bound to follow the ruling in *Antolovich* and that, even if they weren't,

[3] *Id.* at 715
[4] *Id.* at 716.
[5] 284 Mich. App. 703, 704; N.W.2d 347, 349 (Mich. Ct. App. 2009).
[6] *Id.* at 710.
[7] The court argued that the plain language of MCL 769.1k and MCL 769.34(6) had not codified *Antolovich*, but rather had changed the law. As part of their reasoning, the court noted that MCL 769.1k was enacted over 12 years after the *Antolovich* decision. *See id.*
[8] *Id.* (citing People v Dunbar, 264 Mich. App. 240, 254-255; 690 N.W.2d 476 (2004)).
[9] People v. Jackson, 483 Mich. 271, 289; 769 N.W.2d 630, 640 (Mich. 2009).

"justice dictates that there must be some basis for determining whether a discretionary decision like the amount of a fine constitutes an abuse of that discretion."[10]

b. Courts Applying the Michigan Excessive Fines Clause Using Federal Principles

Michigan courts have, in general, not directly invoked the federal Excessive Fines Clause in cases involving fees, fines, and restitution. Instead, various Michigan courts have analyzed the state's equivalent using federal principles, noting the state equivalent's similarity to the protections of the Eighth Amendment.[11] A key example of this can be found in *In re Forfeiture of $25,505*.[12] Operating in a pre-*Timbs v. Indiana* world, the Court of Appeals noted that the Excessive Fines Clause did not necessarily apply to the states.[13] The court then analyzed whether the fine in question was excessive under the Michigan Constitution, relying on federal case law.[14] Now that *Timbs* has explicitly extended the Excessive Fines Clause to the states,[15] there might be space to argue that state courts should apply the federal Excessive Fines Clause, explicitly.

3. *Austin v. United States* in the Juvenile Delinquency Context

a. Overview of *Austin v. United States*

You asked me to research whether *Austin v. United States* has been applied in the juvenile delinquency context.[16] *Austin* involved an individual who had been convicted of cocaine

[10] People v. Brunke, Nos. 341160 & 341161, 2019 WL 488797, at *3 (Mich. Ct. App. Feb. 7, 2019).
[11] *See, e.g.*, *In re* Forfeiture of 5118 Indian Garden Rd., 654 N.W.2d 646, 648–49 (Mich. Ct. App. 2002) ("These factors dovetail, to a certain extent, with the United States Supreme Court's statement in United States v. Bajakajian, 524 U.S. 321, 337 (1998). . . ."); *Antolovich*, 525 N.W.2d at 515 (declining to determine whether the fine violated the Eighth Amendment of the United States Constitution, but invalidating the fine as excessive under the state constitution).
[12] 560 N.W.2d 341, 347 (1996).
[13] *Id.*
[14] *Id.*
[15] Timbs v. Indiana, 139 S. Ct. 682, 688 (2019).
[16] Austin v. United States, 509 U.S. 602 (1993).

possession, after which the government filed an *in rem* action seeking forfeiture of his mobile home and auto shop. The Supreme Court, ruling in favor of Austin, held that civil forfeiture proceedings are "subject to the limitations of the Eight Amendment's Excessive Fines Clause.[17] The court further explained that any economic sanction can be considered a "fine" under the Excessive Fines Clause if it exists "in part to punish."[18] Redacted co-worker 1 ["RC"] noted that we have typically applied this test when we want to argue that things not expressly labeled fines—for example, fees, surcharges, or restitution—should be subject to the EFC's protections. RC also thinks that the same test should apply to determine whether the EFC applies to certain proceedings, such as penalties issued in civil or quasi-criminal contexts, and that this could be relevant in a juvenile context, as well.

b. *Austin* in Michigan Caselaw

Based on RC's initial search of Michigan caselaw, he asked me to look at the applicability of *People v. Hana*, which he thought might be relevant.[19] Although I don't think it's entirely on point for EFC purposes, as I explain below, I have included analysis of the key issues. In *Hana*, the main question before the Supreme Court of Michigan was whether the full panoply of protections provided by the Fifth and Sixth Amendments of the United States Constitution applied to both the dispositional and adjudicative phases of a juvenile waiver hearing.[20] The

[17] *Id.* at 622.
[18] *Id.* at 610.
[19] 443 Mich. 202, 225–27; 504 N.W.2d 166, 177-178 (1993).
[20] Under Michigan law, on the motion of the prosecutor, and after a hearing, the juvenile court may waive jurisdiction for the defendant to face trial as an adult, if the child is at least 14, accused of a felony (or any other offense, whether or not designated a felony, that is punishable by more than one year's imprisonment) and if the court finds that (1) there is probable cause to believe the child committed the offense alleged and (2) the best interests of the child and the public would be served thereby. *See* MCL Sec. 712A.4.

court concluded that the constitutional protections that *Kent*[21] and *Gault*[22] had extended to juvenile proceedings apply in full force to the adjudicative phase of a juvenile waiver hearing.[23] However, the court declined to apply them to the dispositional phase of a waiver hearing.[24] The court interpreted the purpose behind the Probate Code and the court rules to favor individualized tailoring of a juvenile's sentence with emphasis on both the child's and society's welfare.[25]

c. Other Caselaw Applying *Austin* in the Juvenile Context

Other state courts have addressed *Austin* to some degree in juvenile cases. In *State v. Niedermeyer*, a juvenile driver's license was revoked by the state following the juvenile's arrest for underage consumption of alcohol.[26] The trial court reversed the revocation, declaring that revocation law unconstitutional.[27] The Alaska Supreme Court agreed with the trial court, and in their opinion emphasized that the statute was punitive in nature and did not provide the defendant with procedural due process.[28]

California courts have also discussed *Austin* in the juvenile context. In *In re J.C.*, the defendant argued that lifetime sex offender registration for juveniles is cruel and unusual punishment under the Eighth Amendment of the United States Constitution.[29] The Third District Court of Appeal declined to rule on whether rationales for sex offender registration applied to juveniles and held that public disclosure aspect of juvenile sex offender registration did not

[21] Kent v. United States, 383 U.S. 541, 556 (1966) (holding that waiver procedures for juveniles to criminal courts were "a 'critically important' action determining vitally important statutory rights of the juvenile.")
[22] *In re* Gault, 387 U.S. 1 (1967) (finding that the Fifth and Sixth Amendment rights recognized in adult criminal proceedings applied to juvenile proceedings).
[23] *Hana*, 443 Mich. at 225.
[24] *Id.* at 204.
[25] *Id.* at 226-227.
[26] 14 P.3d 264 (2000 Alas.).
[27] *Id.* at 266.
[28] *Id.* at 269–270
[29] 13 Cal. App. 5th 1201 (Cal. Ct. App. 2017).

render registration requirement punitive.[30] The court drew its reasoning from *In re Alva*, where a unanimous California Supreme Court held the mere registration of sex offenders was not a punitive measure subject to the proscription against cruel and/or unusual punishment.[31] In applying the *Austin* test, the court said that the civil sanctions are punishment covered by the Eighth Amendment when they "can only be explained as also serving either retributive or deterrent purposes," rather than "*solely* [serving] a remedial purpose."[32]

4. **Other Relevant 'Excessive Fines Clause' Case Law**

a. California

The California Second District Court of Appeal made a particularly strong stance against the criminalization of poverty, with implications for juvenile justice, in *People v. Duenas*.[33] The case applies a due process framework and does not include a specific Excessive Fines Clause analysis. I have included the case because of its strong anti-criminalization language and to provide context for other court's discussion of its holding. Although this case did not take place in juvenile court, it did involve fines resulting from juvenile citations that the defendant received as a teenager, and was unable to pay once she reached adulthood, eventually resulting in the revocation of her license and several periods of incarceration.[34] The court considered whether imposing fees and fines on the defendant without considering her ability to pay violated state and federal constitutional guarantees against punishing individuals for their poverty, and answered with a resounding yes.[35] Because poverty was the only reason the defendant could not pay

[30] *Id.*
[31] 33 Cal. 4th 254, 260; 92 P.3d 311, 312 (Cal. 2004).
[32] *Id.* at 283.
[33] 30 Cal. App. 5th 1157 (Cal. Ct. App. 2019).
[34] At the time the case was decided, Ms. Duenas was a young, homeless mother of several young children living on public assistance. The court also noted that each of Ms. Duenas's prior arrests and convictions had resulted from her initial inability to pay to restore her suspended license when she was a teenager. *Id.* at 1160-1161.
[35] *Id.* at 1160.

restitution and court costs, using the criminal process to collect that money would have been a violation of due process under the California Constitution's Article I, § 7 and the federal 14th Amendment.[36] The court stated that due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under the specific provisions at issue.[37] Although that particular provision required the trial court to impose a restitution fine, the trial court was also required to stay the execution of the fine until and unless the state demonstrates that the defendant has the ability to pay the fine.[38]

While some subsequent courts have distinguished *Duenas* by limiting it to its facts, other courts have more directly criticized the decision, and – as it relates to this memo's topic – applied an Excessive Fines Clause analysis in similar situations.[39] In *People v. Aviles*, the Fifth District Court of Appeal found that the Excessive Fines Clause was more appropriate than a due process argument for an indigent defendant to challenge the imposition of fees, fines, and assessments.[40] In *People v. Hicks*, the Fifth District Court of Appeal held that, in contrast to *Duenas*'s due process analysis, a due process violation must be based on a fundamental right, such as denying a defendant access to the courts or incarcerating an indigent defendant for nonpayment.[41]

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[36] *Id.* at 1168-1169.
[37] *Id.* at 1164.
[38] *Id.*
[39] *See* People v. Caceres, 39 Cal. App. 5th 917, 928–929 (Cal. Ct. App. 2019) (declining to apply *Duenas*'s "broad holding" beyond its unique facts). *See also* People v. Lowery, 43 Cal. App. 5th 1046, 1055 (2020), *review denied* Mar. 11, 2020 (Stating that the "appellants were not caught in an unfair cycle, and they could have avoided the present convictions regardless of their financial circumstances.").
[40] 39 Cal. App. 5th 1055, 1069 (Cal. Ct. App. 2019).
[41] 40 Cal. App. 5th 320, 322 (Cal. Ct. App. 2019). *See also* People v. Kingston 41 Cal. App. 5th 272, 279 (Cal. Ct. App. 2019) (finding *Hicks* to be "better reasoned" than *Duenas*); People v. Caceres, 39 Cal. App. 5th 917, 928 (Cal. Ct. App. 2019) ("In light of our concerns with the due process analysis in *Duenas*, we decline to apply its broad holding requiring trial courts in all cases to determine a defendant's ability to pay before imposing court assessments or restitution fines.").

5. Conclusion

Although I could not find any specifically on-point caselaw in Michigan or the Sixth Circuit that discusses the Excessive Fines Clause in juvenile delinquency proceedings, *Timbs v. Indiana* and related litigation in state courts marks a promising shift in the Excessive Fines Clause being utilized to challenge to court-imposed fees and fines.

Applicant Details

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Last Name	**Scerbo**
Citizenship Status	**U. S. Citizen**
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Applicant Education

BA/BS From	**University of Georgia**
Date of BA/BS	**May 2021**
JD/LLB From	**Cornell Law School** **http://www.lawschool.cornell.edu**
Date of JD/LLB	**May 11, 2024**
Class Rank	**30%**
Law Review/Journal	**Yes**
Journal(s)	**Cornell Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**2022 Langfan First Year Moot Court Competition** **Jessup Moot Court** **2022 Cuccia Cup Competition** **Undergraduate Moot Court Team (3 years)**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Appellate, Death Penalty, Habeas**

Recommenders

Weyble, Keir
kw346@cornell.edu
607-255-3805

Whelan, Michelle
maf282@cornell.edu
607-254-4753

Kenney, Chad
Judge_Chad_F_Kenney@paed.uscourts.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

616 East State Street, Apt. 2
Ithaca, NY 14850
gs567@cornell.edu
(610) 350-1400

June 19, 2023

The Honorable Juan R. Sanchez
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Judge Sanchez,

I am writing to apply for a clerkship in your chambers for the 2024-2025 term. I am a rising 3L at Cornell Law School and the Editor-in-Chief of the *Cornell Law Review*. I am currently working as a Summer Associate at Weil, Gotshal & Manges in New York. I want to clerk in your chambers because I was born and raised for half of my childhood in Philadelphia and want very much to clerk back in the city where I am from.

The summer after my 1L year I served as a Judicial Intern for the Honorable Chad F. Kenney, a federal district judge for the Eastern District of Pennsylvania. The opportunity to be in Philadelphia and work in the Eastern District has stuck with me, and I want nothing more than to return to the courthouse as a law clerk. Before going to law school, I attended the University of Georgia, Honors College, and learned about the legal system through my internship at the Western Judicial Circuit Public Defender's Office in Athens, my position as an advocate at the Project Safe women's shelter in Athens, and as a Court-Appointed Special Advocate for Children First. My long-term goal is to practice appellate criminal defense for clients on death row, hopefully for the Pennsylvania Innocence Project. I have always maintained strong relationships with former professors and teachers, and I would love nothing more than to clerk for a judge who sits in my hometown.

I will be in New York City until late July, and I know Philadelphia is a short train ride from the city. I am of course more than happy to interview at whatever time is most convenient for you.

I have included my resume, law school transcripts, undergraduate transcript, and one writing sample. Letters of recommendation from professors Michelle Whelan, Keir Weyble, and the Honorable Judge Chad F. Kenney, for whom I interned following my 1L year, will be submitted by Cornell. If you need any additional information from me, please do not hesitate to let me know. Thank you very much for considering my application.

Sincerely,

Gianna Scerbo

Gianna Isabella Scerbo

(610) 350-1400 | gs567@cornell.edu | Ithaca, NY | https://www.linkedin.com/in/gianna-scerbo-b19914159

EDUCATION

Cornell Law School — **Ithaca, NY**
Juris Doctor Candidate — May 2024
GPA: 3.66
Honors: Cornell Law Review, *Editor-in-Chief*; LII Supreme Court Bulletin, *Associate*
Lawyering Program, *Honors Fellow*; Dean's List (Spring 2022, Fall 2022, Spring 2023)
Myron Taylor Scholar (top 30% after 2L year)
Activities: 2023 Jessup Moot Court Competition, *New York Regionals Top 10 Oralist*
2022 Cuccia Moot Court Competition, *Round of 16*; 2022 Langfan Competition, *Round of 16*
Moot Court Board, *Member & Diversity Committee Member*
First Generation Student Association, *3L Rep.*
International Refugee Assistance Project, *Research Volunteer*

University of Georgia, Honors Program — **Athens, GA**
Bachelor of Arts in Philosophy, *summa cum laude*, with minor in English Literature — May 2021
GPA: 3.96
Honors: Presidential Scholar, Highest Honors Distinction; Presidential Award of Excellence
Zell Miller Scholarship (full tuition)
Honors International Scholars Policy Scholarship to volunteer in Thailand and Laos in 2019
Activities: American Moot Court Association 2020 South Atlantic Regional Tournament, *Finalist*
American Moot Court Association 2019 Mid-Atlantic Regional Tournament, *Semifinalist*
Institute of Native American Studies, *Teaching Assistant*

EXPERIENCE

Weil, Gotshal, & Manges — **New York City, NY**
Summer Associate — *Summer 2023*

Capital Punishment Clinic, Cornell Law School — **Ithaca, NY**
Student Attorney — *Aug. 2022 – Present*

- Conference weekly with legal team for one client on death row in Phoenix, Arizona.
- Draft memos regarding various legal issues, conduct legal research, and meet with attorneys.

U.S. District Court for the Eastern District of Pennsylvania — **Philadelphia, PA**
Judicial Intern to the Honorable Chad F. Kenney — *May 2022 – July 2022*

- Completed legal research, prepared motions and briefs, and submitted memoranda and reports.
- Attended daily hearings in court and assisted law clerks and Judge Kenney in analyzing cases.

Children First, Inc. — **Athens, GA**
Court-appointed Special Advocate for Family and Juvenile Courts — *Mar. 2020 – Mar. 2021*

- Worked as an advocate on a case for children placed in the foster care system.
- Conducted family research, attended court hearings, and submitted evidence to court.

Project SAFE, Inc. — **Athens, GA**
Shelter Advocate (part-time) — *July 2020 – Feb. 2021*

- Worked as an advocate on a case for children(s) placed in the Athens-Clarke County foster care system.

Athens Public Defender's Office — **Athens, GA**
Undergraduate Intern — *Aug. 2019 – May 2020*

- Worked with Assistant Defenders on cases and gained experience in criminal law and procedure.
- Met with clients at county jail and completed intake and financial qualification interviews.

INTERESTS

Early 2000s Romantic Comedy Filmography, Picnicking, Playing Chess, Hiking, Reading.

Cornell Law School - Grade Report - 06/02/2023

Gigi Scerbo

JD, Class of 2024

Course	Title	Instructor(s)	Credits	Grade
Fall 2021 (8/24/2021 - 12/3/2021)				
LAW 5001.1	Civil Procedure	Clermont	3.0	B
LAW 5021.1	Constitutional Law	Dorf	4.0	A-
LAW 5041.1	Contracts	Anker	4.0	A-
LAW 5081.4	Lawyering	Fongyee Whelan	2.0	A-
LAW 5151.1	Torts	Dorfman	3.0	B+

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	16.0	16.0	16.0	16.0	16.0	16.0	3.4806
Cumulative	16.0	16.0	16.0	16.0	16.0	16.0	3.4806

Spring 2022 (1/18/2022 - 5/2/2022)				
LAW 5001.2	Civil Procedure	Gardner	3.0	A-
LAW 5061.1	Criminal Law	Arnaud	3.0	B+
LAW 5081.4	Lawyering	Fongyee Whelan	2.0	A-
LAW 5121.1	Property	Dinner	4.0	A
LAW 6401.1	Evidence	Weyble	4.0	A-

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	16.0	16.0	16.0	16.0	16.0	16.0	3.6887
Cumulative	32.0	32.0	32.0	32.0	32.0	32.0	3.5846

^ Dean's List

Fall 2022 (8/22/2022 - 12/16/2022)				
LAW 6263.1	Criminal Procedure - Adjudication	Blume	3.0	A
LAW 6641.1	Professional Responsibility	Wendel	3.0	A-
LAW 6881.656	Supervised Writing/Teaching Honors Fellow Program	Fongyee Whelan	2.0	SX
LAW 7259.101	Faculty At Home Seminar: Constitutional Law in the News	Johnson	1.0	SX
LAW 7811.301	Capital Punishment Clinic 1	Johnson/K. Weyble	4.0	A-

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	13.0	13.0	13.0	13.0	10.0	10.0	3.7690
Cumulative	45.0	45.0	45.0	45.0	42.0	42.0	3.6285

^ Dean's List

Spring 2023 (1/23/2023 - 5/16/2023)				
LAW 6011.1	Administrative Law	Stiglitz	3.0	B+
LAW 6264.1	Criminal Procedure - Investigations	Yates	3.0	A
LAW 6437.1	Federal Practice and Procedure	Nathan	1.0	SX
LAW 6881.654	Supervised Writing/Teaching Honors Fellow Program	Fongyee Whelan	2.0	SX
LAW 7815.301	Capital Punishment Clinic 2	Blume/Freedman/Knight	4.0	A

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	13.0	13.0	13.0	13.0	10.0	10.0	3.7990
Cumulative	58.0	58.0	58.0	58.0	52.0	52.0	3.6613

^ Dean's List

Total Hours Earned: 58

June 20, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It is my pleasure to recommend Gigi Scerbo for a clerkship. I have known her since the Spring 2022 law school semester, first as a student in my Evidence course, and later as a two-semester (Fall 2022 and Spring 2023) participant in the Capital Punishment Clinic that I co-teach. Across that time, I have had ample opportunity to see Gigi in a large classroom setting, and to work with and supervise her more closely in a small-team clinical setting. She has impressed me in many ways, and I am convinced that she will make an excellent law clerk, and go on to become an outstanding lawyer.

I first became acquainted with Gigi when she enrolled in my Evidence course as her 1L elective. She sat near the front, in the middle, and quickly established herself as a reliable volunteer participant in classroom discussions. She was well prepared and sharp, and her comments were usually on the mark, but even when they weren't, she took challenges and corrections in stride, remained positive, and never hesitated to try again. As I would discover as the semester progressed, that approach is characteristic Gigi: her first priority is to learn and develop as a future lawyer, and she does not allow her pursuit of that objective to slowed by the weight of her work load or the risks that come with venturing an answer to a classroom question other students are unwilling to touch. As an instructor, I found her combination of ability and humility refreshing and likeable, and I was happy to see her succeed with an A- in the course.

Having had such a positive introduction to Gigi during her semester in Evidence, I was glad to see her enroll in the Capital Punishment Clinic at the start of her 2L year. Beginning in August, 2022, and continuing through April, 2023, she was assigned to a small team working under my supervision on a capital case as the state collateral review phase neared completion and the transition to federal habeas corpus review approached. Because we were new to the case, our team's early work included a substantial amount of laborious record review and organization. Gigi voluntarily took on more than her fair share of that work, and then proceeded to carry it out with remarkable efficiency, enthusiasm, and good cheer. As we moved deeper into the case, she was also called upon to perform more substantive research and writing projects. She took direction on those (and all other) projects very well, was always open to changing course as developments might have dictated, and consistently delivered written product that was thorough, well sourced, soundly reasoned, and nicely crafted. In short, she did excellent work and made many valuable contributions to the efforts of her clinic team.

Having now spent three semesters teaching and working with Gigi in different settings, I have made a few other observations that I believe are also germane to her suitability for a clerkship and, longer term, the practice of law. First, she has a prodigious capacity for hard, sustained work and efficient time management, as demonstrated by her simultaneous (and successful) work as an Honors Fellow, an Associate of the LII Supreme Court Bulletin, and a member – and later Editor in Chief – of the Cornell Law Review, all while maintaining a full 2L course load. Additionally, as her election to the position of Editor in Chief suggests, and as my own observations of her in the clinic team setting confirm, Gigi works very well with, and commands both the respect and affection of, her peers.

Finally, I support Gigi's effort to secure a clerkship, not only because she has earned it, but also because I know she wishes to clerk for what I regard as especially good reasons. Her goal is to build a career as an appellate lawyer handling the cases of indigent criminal defendants, and she rightly sees a clerkship as an essential piece of her training for that work. While she is already highly accomplished, she is also humble and self-aware enough to know she has not yet arrived; she seeks out and values mentorship, is grateful for opportunities and guidance, takes nothing for granted, and exhibits no sense of entitlement.

In sum, everything I know about Gigi convinces me that she has all of the tools to be an excellent judicial law clerk, and will make the most of any opportunity afforded her. I recommend her highly and without reservation.

Please do not hesitate to contact me if I can provide you with additional information.

Sincerely yours,

Keir M. Weyble
Clinical Professor of Law

Keir Weyble - kw346@cornell.edu - 607-255-3805

June 20, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I enthusiastically recommend Gigi Scerbo for a judicial clerkship.

Gigi was a first-year student in my Lawyering course during the 2021-2022 academic year. She was also one of my teaching assistants, or Honors Fellows, for the subsequent academic year for that same course. I worked closely with her for two academic years and feel qualified to speak about her temperament and abilities.

The Lawyering course is what is traditionally known as the "legal research and writing" class. It is not an easy course for first-year law students. As they have to do in their other first-year law courses, the students must learn to read, decipher, and accurately interpret complicated legal opinions. Additionally, because we always work with a given set of facts, the students must be able to discern what is relevant in a legal opinion and what is not relevant. They must also synthesize apparently disparate opinions in an attempt to formulate general rules or patterns for a particular legal issue. After they figure out the relevant law, they must then turn around and communicate that law and the relevant analysis in a logical, organized, and clear fashion.

When she was a student in the course, Gigi wrote four litigation-oriented papers (one was a scheduled rewrite) and a short substantive email. The topics covered the free-speech rights of public employees under the First Amendment; the use of leading questions during direct examination under Rule 611(c) of the Federal Rules of Evidence; and the interpretation of section 9.94A.825 of the Revised Code of Washington. Gigi's work was consistently excellent—the writing clear and concise, the research thorough, and the analysis logical and sound. She started the course with strong writing skills, and with that strong foundation, she quickly transformed into an effective legal writer.

Gigi also did two oral presentations: (1) a discussion with a "supervising partner" about research results and (2) a pretrial oral argument. During both presentations, she was calm and articulate under pressure. She prepared well for each presentation and was honest about what she knew and what she did not know. She was comfortable enough to ask for clarification, if necessary, before she answered questions. Overall, she inspired confidence that she had thoroughly researched and understood the law, accurately described it, and properly applied it to the facts in question.

It was a pleasure to work with Gigi because I could see her concrete and measurable progress. She responds well to feedback and readily implements it. As a result, Gigi received an A minus for both the fall and spring semesters, a very good grade in my class. Indeed, I was not surprised to learn that she had been competitively selected to join the Cornell Law Review. Her work on the Law Review has further sharpened her writing skills, as has her summer internship working for the Honorable Chad F. Kenney and her participation in the Capital Punishment Clinic. I have no doubt that her work as a summer associate with Weil, Gotshal & Manges will take her writing and research skills to yet another level.

I was delighted when Gigi agreed to be a teaching assistant for the Lawyering course, and I enjoyed working with her in that capacity. When I select TAs, I look for someone who is smart, attentive to detail, respectful of my deadlines, and capable of independent work. I also look for someone with a cheerful and pleasant personality and someone who is a team player. At times, it is hard to find all of these qualities in one person, but I had already seen them in Gigi. The 1L students looked up to her and regularly sought her out because she delivered suggestions for improvement in a way that was encouraging but concrete. Quite simply, she made my work life easier, not harder.

Gigi's success as a teaching assistant was particularly impressive because the work is time-consuming. Among other responsibilities, she attended my classes, met with the students to discuss their assignments, commented on the students' papers, and co-taught some classes on legal citation. At the same time, Gigi competed in moot-court competitions, worked as an associate on the Law Review and on the Legal Information Institute's Supreme Court Bulletin, and volunteered for the International Refugee Assistance Project. And, of course, she had other coursework. She was also an engaged member of the First Generation Law Student Association and the Women's Law Coalition. Incredibly, Gigi took on yet another challenging role in the spring of 2023 when she ran for, and was elected to, the position of Editor-in-Chief of the Law Review. None of these additional responsibilities affected the quality of her work as my teaching assistant.

Gigi wants to clerk to, among other things, further strengthen her already impressive research and writing skills on her way to a career in appellate litigation. However, though she will gain much from a judicial clerkship, Gigi also will bring value to chambers. Specifically, she adjusts quickly to her environment, and she is not afraid of or intimidated by hard work. She is also quite comfortable working in a small office with a small group of people of all ages. And, she is familiar with working in chambers because, as mentioned above, she interned for the Honorable Chad F. Kenney in the United States District Court for the Eastern District of Pennsylvania.

As I hope is quite evident, I cannot say enough about Gigi; she will be an outstanding judicial clerk. Please do not hesitate to contact me at (607) 254-4753 or at maf282@cornell.edu if you need more information.

Michelle Whelan - maf282@cornell.edu - 607-254-4753

Respectfully,

Michelle Fongyee Whelan
Associate Dean for Diversity, Equity, and Inclusion & Clinical Professor of Law

Michelle Whelan - maf282@cornell.edu - 607-254-4753

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Chambers of
Honorable Chad F. Kenney
Judge

11613 United States Courthouse
601 Market Street
Philadelphia, PA 19106
(267) 299-7540

August 29, 2022

Re: Gianna Scerbo

Dear Judge,

I write in support of Gigi Scerbo's clerkship application. Gigi just finished up with me in Chambers as one of my Summer Interns and from I observed of her as a person, a professional, and a legal thinker, writer, and communicator she will be an outstanding law clerk and a pleasure to work with. She has my highest recommendation.

I work directly with the Summer Interns and meet with them individually once a week. Each is assigned to a law clerk who then works closely with them and mentors them. Gigi's work was outstanding, and it covered a significant number of areas in the ten weeks she was with us. She researched and drafted the statement of facts for a summary judgment motion in a fraudulent wire transfer case between a non-customer and a bank, she performed research on constructive discharge for a summary judgment motion in an employment case, she drafted the introduction to voir doir and voir dire questions for a case that settled on the eve of trial, she analyzed the facts and factors in preparation for an appeal on a bail ruling, and drafted the initial version of the order, and she did impressive work on a motion to compel regarding the government informant privilege.

Gigi is ready to hit the ground running. We had a busy Summer so Gigi was exposed to almost every type of hearing in court, as well as getting to observe the entire jury trial process. She wrote cover memoranda

for Rule 16 conferences and then was able to observe the conferences in court. We meet as a full Chambers each week to review all open motions. As a result, Gigi understands the types of motions we get, and the importance of the standard of review to be used depending on the issue at hand and the stage of litigation. We discuss each open motion as a group with the law clerk or intern assigned to the particular motion giving an oral presentation of the issues. Gigi's briefings were always good and succinctly articulated so all quickly understood the issues. She was always on target, always asked great questions, had good insights and had a great attitude. She demonstrated just the right tone in response to feedback.

The law clerk who mentored Gigi was a Columbia Law grad, an associate attorney in a Manhattan for four years, and a tough, exacting task master. She was across the board happy with Gigi, indicating that "her attitude is positive and pleasant. I would definitely work with Gigi again, no question. I think she will develop into a stellar attorney." I would add that she will, from the outset, be a stellar law clerk.

If you have any questions about Gigi's performance here, please give me a call.

Very truly yours,

/s/ Chad F. Kenney

CHAD F. KENNEY, JUDGE

CFK/slm

Gianna Scerbo

Writing Sample

The following is a brief that I wrote for Cornell Law School's annual Cuccia Cup Moot Court Competition, which occurs every fall semester. I have omitted the first half of the tables of authorities and contents, as well as part of the Seventh Amendment analysis covered by my competition partner. Only I have written and edited the remaining material.

No. CLS 2022-3

In The
Supreme Court of the United States
October Term, 2022

SECURITIES AND EXCHANGE COMMISSION,

Petitioners,

v.

WHEELER,

Respondents.

On Writ of Certiorari
to the United States Supreme Court

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

GIANNA I. SCERBO
Counsel of Record
Lawyers For Insecurity
618 East State Street #9, Ithaca N.Y. 14850

October 21, 2022

QUESTIONS PRESENTED

1. Were respondents deprived of their constitutional right to a jury trial?

2. Did Congress unconstitutionally delegate legislative power to the SEC by failing to provide it with an intelligible principle by which to exercise the delegated power?

3. Did the statutory removal restrictions on SEC administrative law judges violate Article II?

STATEMENT OF THE CASE

This case began after the Securities and Exchange Commission (" SEC") launched an investigation into Mr. Wheeler's investing activities in 2011. Record 2. Respondent Mr. Wheeler was the creator of two hedge funds and Respondent Hawkins Lab served as the financial advisor to those hedge funds. Record 1. Respondents were extremely successful in their business, holding about $24 million in assets at the time the SEC brought their action against Mr. Wheeler.

A couple of years after launching the investigation, the SEC brought an action within the agency against Respondents, alleging that they had committed fraud under the Securities Act, the Securities Exchange Act, and the Advisers Act. Record. 2. Respondents sued in federal district court to enjoin the agency proceedings, arguing that they infringed upon several constitutional rights. Record 2. However, the district court, and the court of appeals, denied Respondents' claim, declaring the district court had no jurisdiction, and instead Respondents had to continue agency proceedings and could petition the court of appeals to review any adverse final order. Record 2. Following an evidentiary hearing, the Administrative Law Judge ("ALJ") in Respondents' case concluded that Respondents committed securities fraud. Record 2.

Respondents sought review by the Commission, which affirmed the ALJ's ruling. Record 2. The Commission ordered Respondents to cease committing further violations and to pay a civil penalty of $300,000 and ordered Respondent Hawkins Lab to disgorge nearly $685,000 in ill-gotten gains. Record 2. The Commission further barred Respondent Wheeler from participating in various securities industry activities. Record 3. The Commission rejected the constitutional arguments raised by Respondents. Record 3.

Respondents appealed, and the Thirteenth Circuit reversed, holding that the SEC agency proceedings suffered from three independent constitutional defects: (1) Respondents were

deprived of their constitutional right to a jury trial; (2) Congress unconstitutionally delegated legislative power to the SEC by failing to provide it with an intelligible principle in the exercise of its delegated power; and (3) the statutory removal restrictions on SEC ALJs violate the Take Care Clause of Article II. Record 3. This appeal followed.

SUMMARY OF ARGUMENT

This Court should uphold the decision of the Court of Appeals for the Thirteenth Circuit and find that the actions and structure of the SEC violate the United States Constitution for three reasons. First, The SEC's adjudication of the claims against Mr. Wheeler deprived him of his constitutionally-enshrined Seventh Amendment right to a trial by jury. The rights asserted by Mr. Wheeler in this case arose at common law as understood by the Seventh Amendment, and therefore required he receive a jury trial. Moreover, the remedy Mr. Wheeler seeks is legal in nature. Second, Congress's delegation of power to the SEC, specifically the authority over their enforcement actions, violates the nondelegation doctrine established by this Court's precedent. The power to decide which disputes may be assigned to agency proceedings is legislative in nature, and Congress failed to provide the SEC with an intelligible principle to use to guide the use of that legislative power. Third and finally, the statutory removal restrictions on the SEC ALJs violate the Take Care Clause of Article II. The ALJs carry the status of inferior officers of the United States, and as such they must be subject to removal by the President. However, the ALJs enjoy multiple layers of insulation from the President's ability to remove them, directly violating Article II.

ARGUMENT

I. The SEC Adjudication Deprived Respondent of His Seventh Amendment Right to a Jury Trial.

Respondent was denied his constitutional right to a jury trial by Petitioner's adjudication of the claims against him. The Seventh Amendment right to a jury trial is "of ancient origin," confirmed by the Constitution, occupying a firm place in American history and jurisprudence. *See Dimick v. Schiedt*, 55 S. Ct. 475, 485-86 (1935). Cemented within the Bill of Rights, the Seventh Amendment maintains that "[I]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

This Court previously held that in referring to the "common law," the Framers of the Seventh Amendment were concerned with preserving the right of trial by jury in civil cases where that right previously existed under common law. *Colgrove v. Battin*, 413 U.S. 149, 155 (1973). Thus, if a suit is analogous to "suits at common law," a jury trial on the merits is required. *Tull v. United States*, 481 U.S. 412, 417 (1987). This contrasts with actions that are analogous to 18th-century cases tried in courts of equity or admiralty that do not require a jury trial. *Id.* This common law analysis also applies to causes of action created by congressional enactment. *See Curtis v. Loether*, 415 U.S. 189, 195 (1974).

In order to determine whether a statutory action is akin to traditional actions at common law rather than suits brought in courts of equity or admiralty, both the nature of the action brought and of the remedy sought must be examined. *Tull*, 481 U.S. at 417. When conducting the examination, courts first compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. *Id.* Second, courts consider

the remedy sought and determines whether the remedy is legal or equitable in nature. *Id.* at 417-18.

A. The claims within Petitioner's action against Respondent arose at common law as understood by the Seventh Amendment.

In this case, Petitioner brought multiple claims against Respondent, alleging that he committed various forms of securities fraud. R. 2. Prosecutions for fraud were regularly brought in English courts of common law. *See* 3 William Blackstone, Commentaries on the Laws of England *42. Furthermore, Petitioners sought civil penalties in their case against Respondent in the form of $300,000, in addition to other penalties imposed. R. 2-3. After the adoption of the Seventh Amendment, federal courts followed English common law in treating civil penalty suits as a particular type of an action in debt, which would commonly find a place in the courts of common law, requiring a jury trial. *Tull*, 481 U.S. at 418.

Indeed, this Court has upheld, several times, that suits bringing civil penalties require a jury trial. *See Lees v. United States*, 150 U.S. 476, 479 (1893) ("[A]lthough the recovery of a penalty is a proceeding criminal in its nature . . . . it may be enforced in a civil action, and in the same manner that debts are recovered in the ordinary civil courts."); *Hepner v. United States*, 213 U.S. 103, 115 (1909) (holding that the defendant was entitled to summon a jury in a case involving a civil penalty); *United States v. Regan*, 232 U.S. 37, 47 (1914) (assuming that a jury trial is mandatory in suits involving civil penalties).

This Court should apply the holding in *Tull* to the present case of Respondent Mr. Wheeler, because the two cases are analogous. In *Tull,* this Court held that the right to a jury trial attaches to a suit seeking civil penalties for violations of the Clean Water Act. *Tull*, 481 U.S. at 425. Here, Petitioner seeks civil penalties for Respondent's alleged violations of various securities statutes. R. 2-3. Thus, both cases involve the question of Seventh Amendment

attachment in cases concerning civil penalties under federal statute, and this Court has already supplied an answer to that question. The same answer, given the similarity of the present case to established precedent, should be handed down once again.

It is important to note that this Court has also never held that Congress may never assign adjudications to agency processes that exclude a jury. In fact, this Court has held the opposite. *Atlas Roofing Co. v. Occupational Safety & Health Rev.Comm'n*., 430 U.S. 442, 455 (1977). Furthermore, in *Oil States Energy Servs., LLC v. Greene's Energy Grp.*, this Court wrote that "[W]hen Congress properly assigns a matter to adjudication in a non Article III tribunal, the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." 138 S. Ct. 1365, 1379 (2018). Whether Congress properly assigned a matter to adjudication in a non Article III tribunal, in satisfaction of the Seventh Amendment, is a question under the Public Rights Doctrine. *Atlas Roofing*, 430 U.S. at 450.

B. The remedy sought by Petitioner is legal in nature.

A civil penalty, rather than an equitable remedy, was a type of remedy at common law that could only be enforced in courts of law. *Tull*, 481 U.S. at 422. Remedies created to punish culpable individuals, as opposed to remedies created simply to extract compensation or restore the status quo, were issued by courts of law, rather than courts of equity. *Id.* In fact, in *Curtis v. Loether*, this Court maintained that punitive damages exist as a legal, rather than an equitable, remedy. *See* 415 U.S. at 197; *see also Ross v. Bernhard*, 396 U.S. 531, 536 (1970) (finding that a treble-damages remedy for securities violation is a penalty, which constitutes a legal remedy). It is clear in this case that the SEC imposed a civil penalty of $300,000 in order to punish Mr. Wheeler. The penalty on Mr. Wheeler contains no clear connection to compensation, nor the restoration of any sort of status quo.

Moreover, it is true that some of the other remedies the SEC seeks from Mr. Wheeler and Respondent Hawkins Lab are more equitable in nature, such as banning Mr. Wheeler from participating in securities industry activities, and requiring Respondent Hawkins Lab to disgorge ill-gotten gains. R. 2-3. However, this Court has held that the Seventh Amendment nonetheless applies to proceedings that involve both legal and equitable claims. *See Ross*, 396 U.S. at 537-38; *see also Tull*, 481 U.S. at 425 (finding that the petitioner had a jury right to decide the legal claims even though the Government was free to seek equitable claims in addition to those claims). In *Ross*, this Court found that facts relevant to the legal claims should be adjudicated by a jury, even if those facts relate to equitable claims as well. *Ross*, 396 U.S. at 537. This is consistent with rulings from the federal appellate circuits deciding agency adjudication of legal and equitable claims. *See, e.g.*, *SEC v. Lipson*, 278 F.3d 656, 662 (7th Cir. 2002) (finding that the defendant was entitled to a jury trial because the SEC sought legal relief in the form of penalties, even though the SEC also sought equitable relief). Thus, even if this Court finds that some of the remedies sought by the SEC are equitable in nature, the Seventh Amendment jury right should still attach because of the existence of the civil penalty sought, which is a remedy that is decidedly legal in nature.

II. The Delegation by Congress to the SEC of authority over its enforcement actions was not a valid delegation of power.

A. The power delegated by Congress was legislative in nature.

It has long been the established precedent in this country that Congress may not simply abdicate or transfer its legislative functions to administrative agencies. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). In *INS v. Chadha*, this Court wrote that whether actions taken by either House are an exercise of legislative power depends not on their form but "whether they contain matter which is properly to be regarded as legislative in its

character and effect." 462 U.S. 919, 952 (1983). The Court in *Chadha* then went on to find that the particular action taken by the House in that case was legislative in nature, because it "had the purpose and effect of altering the legal rights, duties and relations of persons." *Id.* Furthermore, in *Oceanic Steam Navigation Co. v. Stranahan*, this Court found that the power to assign disputes to agency adjudication is "peculiarly within the authority of the legislative department." *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909). In fact, this Court recognized that the power to assign disputes to agency adjudication is a *particularly* legislative function in nature. *See, e.g.*, *Crowell v. Benson,* 285 U.S. 22, 56 (1932) (finding that the question for whether a dispute may be assigned to an agency or to an Article III court is one for Congress to answer).

Here, the delegation to the SEC of authority over its enforcement actions is the delegation of a legislative function because the SEC has been given the authority to do exactly that which has been found to be a legislative function of Congress: deciding which cases are assigned to administrative tribunals. This Court has upheld the principle that Congress alone must decide whether and where disputes may be brought. By allowing the SEC to make that decision instead of Congress, Congress unconstitutionally delegates a legislative power to the SEC. Moreover, just as the legislative action found in *Chadha,* the action here has the purpose and effect of altering the legal rights of Mr. Wheeler. Because the SEC has the authority to decide where they may bring their actions against Mr. Wheeler, they essentially decide what his legal rights *are* in any given case.

B. Congress did not provide an intelligible principle to guide the SEC.

In 1928, this Court articulated the intelligible principle standard, writing: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized .

. . . is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton, Jr. & Co.*, 276 U.S. 394, 409 (1928). Seven years later, in *Panama Refining Co. v. Ryan*, this Court struck down a delegation of legislative function, finding that, "Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the [delegation of power] is to be allowed or prohibited." 293 U.S. 388, 430. Thus, this Court's precedent has established for decades that Congress may only delegate to administrative agencies the ability to "fill in the gaps" of law; to provide color to a background that the legislature has already provided the structure and direction for.

Here, Congress's delegation to the SEC of authority over its enforcement actions goes beyond filling in gaps or merely providing color. Instead, in the case before the Court today, Congress has repeated the same failings found in *Panama Refining*: the absence of policy, standard, or rule governing the SEC's authority over its enforcement actions. There is no requirement for the SEC to follow when assigning adjudications, nor is there a definition of circumstances and conditions in which the SEC is allowed to assign cases to an Article III tribunal or to agency adjudication. That decision is left entirely up to the SEC's discretion, and their discretion alone. This is an impermissible and unconstitutional delegation of legislative power.

III. The Removal Restrictions on SEC Administrative Law Judges violates the Take Care clause.

A. SEC Administrative Law Judges are executive officers.

In *Lucia v. SEC*, this Court set out the basic framework for distinguishing between officers and employees of the United States. *See Lucia v. SEC*, 138 S. Ct. 2044, 2047 (2018). Two questions are asked: (1) are the duties "occasional or temporary" rather than "continuing

and permanent"; and (2) is there an exercise of significant authority pursuant to the laws of the United States. *Id.* After analyzing these questions, the court in *Lucia* determined that the ALJs of the SEC, the same ones who decided Mr. Wheeler's case before the Court today, are inferior officers for the purposes of the Appointment Clause. *Id.* at 2048. The Court arrived at this conclusion because ALJs receive a lifetime career appointment, thereby holding continuing and permanent duties. *Id.* Furthermore, they exercise significant authority over the cases coming into their tribunals, pursuant to the laws of the United States. *Id.* For example, ALJs take testimony, conduct trials, and have the power to enforce party compliance with their discovery orders. *Id.*

The status of the ALJs as inferior officers of the United States is vital to the case at bar because that status directly affects the ability of the President to fulfill the Take Care clause of the Constitution. If an employee is an inferior officer, then this automatically places them under the removal authority of the President. If an inferior officer of the United States maintains too many layers of removal protection from the President, then the President's authority over that officer is effectively thwarted. It is this issue that implicates removal concerns for the SEC ALJs. This Court should adhere to the precedent already set in *Lucia* and continue to maintain that SEC ALJs are inferior officers. There is no sound reason to hold that SEC ALJs are inferior officers for purposes of the Appointments Clause, yet not for purposes of the Take Care clause. The clauses are two sides of the same constitutional coin.

B. **The removal restrictions on the Administrative law Judges, in light of their officer status, violates the Take Care Clause.**

In *Myers v. United States*, this Court held that "As [the President] is charged specifically to take care that [the laws] be faithfully executed, his power of removing those for whom he cannot continue to be responsible is essential to the execution of the laws by him." 272 U.S. 52, 117 (1926). Because the SEC ALJs are inferior officers, their ability to be removed is directly

implicated as a matter of importance under the Take Care clause. While this Court went on in subsequent cases to hold that the Take Care Clause does not prevent a for-cause requirement for principal officers, nor does it prevent principal officers from removing inferior officers, this Court nonetheless maintained in *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, that such protections may not overlap. *See* 561 U.S. 477, 484 (2010). To put simply, *Free Enterprise* held that an officer may not enjoy more than one layer of insulation from the President, because doing so essentially guts his ability to oversee them, and therefore inhibits his ability to take care that the laws of this country are being faithfully executed. *Id.* If the President cannot effectively oversee his officers, he cannot effectively maintain his role as chief executive.

Here, SEC ALJs can only be removed by the SEC Commissioners if good cause is found by the Merits Systems Protection Board; in turn, SEC Commissioners and MSPB members can only be removed by the President for cause. Thus, SEC ALJs are insulated from the President by at least two layers of for-cause protection from removal. This is an unconstitutional restriction on removal, particularly in light of the substantial power the ALJs wield for the SEC. ALJs maintain a great deal of control over the cases moving through their tribunals, and their decisions are often final and binding. By providing a double layer of insulation for them from removal, the President's ability to Take Care that laws be faithfully executed is substantially, and more importantly, constitutionally, hindered.

CONCLUSION

Based on the above, the decision from the Thirteenth Circuit Court of Appeals should be affirmed.

Applicant Details

First Name	**Christopher**
Middle Initial	**B**
Last Name	**Scheren**
Citizenship Status	**U. S. Citizen**
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Address	**Address** Street **233 E Erie St, Apt. 1908** City **Chicago** State/Territory **Illinois** Zip **60611** Country **United States**
Contact Phone Number	**6149676285**

Applicant Education

BA/BS From	**Miami University of Ohio**
Date of BA/BS	**May 2018**
JD/LLB From	**Northwestern University School of Law** **http://www.law.northwestern.edu/**
Date of JD/LLB	**May 10, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Northwestern University Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Julius H. Miner Moot Court Competition (intramural)**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hesler, Daniel
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Rountree, Meredith
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Delaney, Erin
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

CHRISTOPHER SCHEREN

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June 17, 2023

The Honorable Juan R. Sánchez
U.S. District Court, Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 8613
Philadelphia, Pennsylvania 19106-1797

Dear Chief Judge Sánchez:

Enclosed please find an application for a clerkship in your chambers for the 2024-25 term. I am a third-year student at Northwestern Pritzker School of Law and will graduate in May 2024. A clerkship in your chambers would provide an invaluable opportunity to observe a range of litigation strategies, learn from an experienced jurist, and broaden my understanding of judicial decision-making in preparation for a career as a litigator. My long-term aspiration is to work as a federal public defender, and I am specifically applying to a clerkship in your chambers because of your experience in public defense. As the first person in my family to attend law school, I am excited for the opportunity to work with and be mentored by a judge with your background.

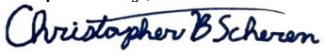
My law school and work experience has prepared me to make a meaningful contribution to your chambers and the work of the court. As a summer associate at Weil, Gotshal & Manges, I am spending my summer rotating through the litigation and restructuring departments. I have also volunteered for pro bono projects in which I have interacted with clients, drafted affidavits, and conducted research. Another formative experience was my internship with the Federal Defender Program for the Northern District of Illinois. Among other tasks, I drafted motions and sections of briefs, authored research memos, prepared correspondence to send to clients, and tracked what charges were considered crimes of violence within the Northern District of Illinois.

My application includes a resume, law transcript, and writing sample, which is a portion of a brief I wrote as part of Northwestern's Julius H. Miner Moot Court competition. Letters of recommendation are provided from:

> Professor Erin Delaney, Northwestern Pritzker School of Law
> erin.delaney@law.northwestern.edu; 312-503-0925
>
> Daniel J. Hesler, Staff Attorney, Federal Defender Program for the Northern District of Illinois
> daniel_hesler@fd.com; 312-621-8347
>
> Meredith Martin Rountree, Senior Lecturer, Northwestern Pritzker School of Law
> meredith.rountree@law.northwestern.edu; 312-503-0227

I would welcome the opportunity to interview with you and discuss my qualifications and interest in the position. Thank you for your consideration.

Respectfully,



Christopher Scheren

Christopher Scheren

233 E. Erie St, Apt. 1908 | Chicago, IL 60611 | (614) 967-6285 | christopher.scheren@law.northwestern.edu

EDUCATION

Northwestern Pritzker School of Law Chicago, IL
Candidate for Juris Doctor, May 2024
GPA: 3.679 (Dean's List All Semesters)

- NORTHWESTERN UNIVERSITY LAW REVIEW, Executive Editor
  - Note, *Sentence Served and No Place to Go: An Eighth Amendment Analysis of Extended Incarceration for Indigent Sex Offenders*, 118 NW. U. L. REV. (forthcoming 2024)
- Research Assistant, Prof. Erin Delaney (researched literature on decolonization constitutions)
- Julius H. Miner Moot Court Competition, Round 3 Best Speaker & Best Brief Finalist (2023)
- Academic and Professional Excellence Program, Peer Advisor
- Federal Bar Association, Co-Vice President of Programming
- Street Law, Inc., Training and Curriculum Vice President

Miami University Oxford, OH
Bachelor of Arts in Political Science, History, May 2018
GPA: 3.820

- *Cum laude*; Phi Beta Kappa; History Department Honors; Atlee Pomerene Prize
- Miami University Dolibois European Center (MUDEC) (Differdange, Luxembourg)
- Sigma Alpha Mu; MUDEC Student Faculty Council; MUDEC Debate Team

EXPERIENCE

Weil, Gotshal & Manges, New York, NY
Summer Associate, May 2023 – July 2023

Federal Defender Program for the Northern District of Illinois, Chicago, IL
Intern, May 2022 – July 2022

- Researched case law, statutes, and sentencing guidelines to support criminal defense
- Assisted in the drafting of legal memoranda, motions for early termination of supervised release, and sections of appellate briefs
- Reviewed and produced summaries of discovery documents, videos, and photographs

Educational Service Center of Central Ohio, Columbus, OH
Substitute Teacher, October 2020 – June 2021

- Taught lesson plans in public high schools and middle schools
- Monitored student conduct and wrote daily summaries for primary instructors

EF English First, Changchun, China
Foreign Teacher, August 2018 – August 2019

- Taught English as a second language to individual students and larger groups of young learners
- Trained peers and new employees on teaching methods for demonstration lessons and activities

ADDITIONAL INFORMATION

Interests: Travel internationally on a shoestring budget and try locally owned restaurants serving regional cuisines from around the world

Northwestern
PRITZKER SCHOOL OF LAW

UNOFFICIAL GRADE SHEET

THIS IS NOT AN OFFICIAL TRANSCRIPT

The Northwestern University School of Law permits the use of this grade sheet for unofficial purposes only.
To verify grades and degree, students must request an official transcript produced by the Law School.

Name:	**Christopher Scheren**	Total Earned Credit Hours:	57.000
Matriculation Date:	2021-08-30	Total Transfer Credit Hours:	0.000
Program(s):	Juris Doctor	Cumulative Credit Hours:	57.000
		Cumulative GPA:	3.679

Term	Term GPA	Course	Course Title	Credits	Grade	Professor
2021 Fall	3.595	BUSCOM 510	Contracts	3.000	B+	Nzelibe,Jide Okechuku
		CRIM 520	Criminal Law	3.000	A	Rountree,Meredith Martin
		LAWSTUDY 540	Communication& Legal Reasoning	2.000	A-	Dodier,Grace
		LITARB 530	Civil Procedure	3.000	B+	Clopton,Zachary D.
		PPTYTORT 550	Torts	3.000	A-	Friedman,Ezra
2022 Spring	3.741	BUSCOM 601S	Business Associations	3.000	A-	Kang,Michael S.
		BUSCOM 605B	Contracts II:Complex Comm Cont	3.000	A-	Markell,Bruce Alan
		CONPUB 500	Constitutional Law	3.000	A	Delaney,Erin F.
		LAWSTUDY 541	Communication& Legal Reasoning	2.000	A-	Dodier,Grace
		PPTYTORT 530	Property	3.000	A-	DiCola,Peter Charles
2022 Fall	3.668	BUSCOM 620	Securities Regulation	4.000	A-	Horwich,Allan
		CONPUB 644	Legislation	3.000	B+	Kleinfeld,Joshua Seth
		CRIM 655	Prisons and Prisoners' Rights	3.000	A	Mills,Alan
		LITARB 601	Legal Ethics & Prof'l Resp	3.000	A-	Muchman,Wendy
		LITARB 616	Pre-Trial Advocacy	2.000	A-	Mayer,Michael P
2023 Spring	3.715	CONPUB 650	Federal Jurisdiction	3.000	A-	Pfander,James E
		CRIM 610	Constitutional Crim Procedure	3.000	B+	Rountree,Meredith Martin
		CRIM 620	Criminal Process	3.000	A-	Rountree,Meredith Martin
		LITARB 608	Litigation,Crises & Strat Comm	2.000	A	Loeb,Harlan A.
		LITARB 670	Negotiation	3.000	A	Gandert,Daniel

Run Date: 6/5/2023 Run Time: 10:26:50 AM

FEDERAL DEFENDER PROGRAM
United States District Court
Northern District of Illinois
55 E. Monroe Street – Suite 2800
Chicago, Illinois 60603

June 17, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

RE: Letter of Recommendation for Christopher Scheren

Dear Judge Sanchez:

I had the pleasure of working with Christopher Scheren during the summer of 2022. I am a staff attorney at the Federal Defender Program. Mr. Scheren was an intern with our office. Mr. Scheren was assigned to me full time for 10 weeks, and I worked with him on a daily basis during that time. I had Mr. Scheren work on a number of assignments, and he consistently did an excellent job. The tasks I had him work on varied. Sometimes they were pure legal research projects. Mr. Scheren did well at that. Other times, I gave him complex data to analyze and he came up with sensible conclusions.

I also had him go through discovery materials. I specifically recall a case involving multiple police videos, and Mr. Scheren created summaries which I eventually relied in in successfully challenging a four level enhancement the government had sought under the federal sentencing guidelines. Eventually, I had him writing drafts of writing projects where I needed clear reasoning and good writing. This is not something I delegate to most law students.

Finally, Mr. Scheren assisted me in the preparation of at least one appellate brief. Mr. Scheren did a great job. Looking back on the work I did that summer and some of the filings I submitted, I am not sure exactly which parts of which are Chris' and which are mine, but I do recall that I grew to trust Mr. Scheren's work.

In short, everything I know about Christopher Scheren is positive. He is smart, he works hard, he is easy to get along with, he understands when to ask questions, and he is capable of taking charge of a project when necessary. He will be an excellent attorney very soon, and I would recommend him highly to anyone considering him for anything.

Sincerely,

/s/ Daniel J. Hesler

Daniel J. Hesler
Staff Attorney
(312) 621-8347

NORTHWESTERN PRITZKER SCHOOL OF LAW

June 17, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am pleased to recommend Christopher Scheren to you. I taught Mr. Scheren criminal law during the Fall of his 1L year. This Spring, he was in both my Constitutional Criminal Procedure class, which surveys the constitutional regulation of the police via the Fourth, Fifth, and Sixth Amendments, and Criminal Process, a doctrinal class covering bail through habeas appeals. He earned an A in Criminal Law, a B+ in Constitutional Criminal Procedure (an exceptionally competitive class), and an A- in Criminal Process.

Without a doubt, Mr. Scheren has a fine academic record, but in my view, it does not adequately capture the outstanding student he is and the outstanding lawyer I expect him to become. Indeed, that his team's brief was a finalist for the Best Brief Award in the Julius H. Miner Moot Court Competition and that his Note was selected for publication by the Northwestern University Law Review better reflect his abilities than a law school exam.

In each class, Mr. Scheren has been a real pleasure to teach. A very hard worker, he was always prepared for class. For me, preparation means not simply reading the assigned pages, but also thinking about the import of the assignment, about how the cases fit within a larger legal and social framework. By the time he came to class, Mr. Scheren was able to engage in a meaningful way with the classroom discussion. He not only gave the right answers to my questions, but he also asked the right questions about the law.

Mr. Scheren also demonstrated the depth of his engagement with the legal issues as he related course material to the real-life situations he saw in his work at the Federal Defender Program for the Northern District of Illinois. His ability to integrate the more abstract legal questions from our class to their real-world application is in my view the best testament to his abilities.

Finally, I would be remiss if I did not comment on how much I have enjoyed working with Mr. Scheren as a person. He is quick to laugh, self-effacing, and welcomes feedback. I believe he would be an outstanding addition to your chambers.

If you have any questions about Mr. Scheren, please do not hesitate to contact me.

Respectfully

Meredith Martin Rountree
Senior Lecturer
Northwestern Pritzker School of Law

Meredith Rountree - meredith.rountree@law.northwestern.edu - (312) 503-0227

NORTHWESTERN PRITZKER SCHOOL OF LAW

June 17, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Christopher Scheren for a judicial clerkship. Chris is a bright, dedicated, capable individual who will be a welcome presence in chambers for both his intellect and his good nature.

I first met Chris in his 1L year. He was a student in my Constitutional Law course, a required class in the spring semester. From the outset, it was obvious that he was deeply engaged with the material. His questions in class and office hours were perceptive and on point, and he performed extremely well on a very difficult exam. Rather than a typical issue spotter, I provided a series of more general questions that required close reading and structured responses. His was among a handful of exams at the top of the class. He showed particular strength in wrestling with equal protection doctrine and the tensions between the anti-subordination and anti-classification views of the Fourteenth Amendment.

Recently, I have been fortunate to have Chris serve as my research assistant. I am working on a project exploring calls to decolonize constitutionalism and asked him to do a large-scale literature review on the topic. He read and synthesized dozens of articles from a variety of perspectives (methodological, historical, theoretical) and about many different areas of the world. He then presented a coherent and cogent analysis of the themes in the literature. I often ask RAs to do this kind of work at the beginning of a project, and never have I received a more thorough or nuanced result. In addition, Chris has fielded my follow-up questions with succinct and helpful answers, including pushing back and correcting me when necessary. I feel fortunate for his assistance and advice and have every confidence Chris will be an excellent clerk.

It has been a pleasure to get to know Chris in these different contexts. His contributions at Northwestern also include a variety of community service projects, as well as a substantial commitment to mentoring and supporting the first-year law students through our APEx (Academic and Professional Excellence) program. APEx advisors are chosen through a rigorous and competitive process. They work closely with 1Ls to help them navigate through the academic, professional, and personal challenges of law school. It is a special role that requires approachability, empathy, patience, and very good judgment.

If you have any questions or would like to discuss Chris's candidacy further, please let me know.

Respectfully,

Erin F. Delaney
Professor of Law
Northwestern Pritzker School of Law

Erin Delaney - erin.delaney@law.northwestern.edu - (312) 503-0925

CHRISTOPHER SCHEREN

233 E. Erie St, Apt. 1908, Chicago, IL 60611 | christopher.scheren@law.northwestern.edu | 614.967.6285

WRITING SAMPLE

This writing sample is excerpted from a revised draft of the brief I wrote in the 2023 spring semester for the Julius H. Miner Moot Court Competition at Northwestern Pritzker School of Law. I performed all of the research myself and this version has not been edited by anyone else.

The case arises in the Supreme Court of the United States on appeal from the (fictional) Twelfth Circuit Court of Appeals. I represent the petitioner, Mr. Charlie Pace, who appeals both his conviction and his sentencing level calculation under the United States Sentencing Guidelines Manual. The question presented that is addressed in this excerpt is whether a motion to suppress evidence permits a district court to withhold the one level reduction for acceptance of responsibility under Sentencing Guideline § 3E1.1(b).

I have modified the brief's original structure for this excerpt. In its complete form, there is a statement of the case, a summary of the argument, an argument section that addresses the first question presented, an argument section that addresses the second question presented, and a short conclusion. For the purposes of this excerpt, I have only included the argument section that addresses the second question presented. Sections have not been renumbered.

II. THIS COURT SHOULD HOLD THAT A MOTION TO SUPPRESS EVIDENCE DOES NOT PERMIT A DISTRICT COURT TO WITHHOLD THE ADDITIONAL ONE LEVEL REDUCTION FOR ACCEPTANCE OF RESPONSIBILITY UNDER GUIDELINE § 3E1.1(b).

This Court should reverse the Twelfth Circuit's holding that affirmed the district court's withholding of the additional one level reduction under § 3E1.1(b) from Mr. Pace's sentencing offense level. This Court reviews the decision *de novo*. *See United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008). Under Sentencing Guideline § 3E1.1(b), a defendant qualifies for an additional one point reduction to his sentencing point total when he qualifies for the two sentencing reduction points under § 3E1.1(a), his offense level is 16 points or higher, and the Government has motioned and stated that the defendant assisted the prosecution by "timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for trial and permitting the Government and the court to allocate their resources efficiently." U.S. Sent'g Guidelines Manual § 3E1.1(b) (U.S. Sent'g Comm'n 2018) (hereinafter U.S.S.G. § 3E1.1(b)). The commentary to this guideline, which this Court finds authoritative, states that while the Government must motion for the third point, a decision to not move for the additional point can only be premised on an interest that is identified in § 3E1.1(b). *Id.* cmt. 6; *Stinson v. United States*, 508 U.S. 36, 38 (1993) (finding commentary to the sentencing guidelines is authoritative). This results in § 3E1.1(b) being mandatory unless the Government or district court can show that the defendant did not allow the Government to avoid preparing for trial or forced an efficient use of the Government's or court's resources. *See United States v. Divens*, 650 F.3d 343, 346 (4th Cir. 2011). Although a motion to suppress can overlap in content with the substance of a trial, a trial requires additional preparations and preparing for a motion to suppress should not be viewed as synonymous with trial preparations. *See United States v. Marquez*, 337 F.3d 1203, 1212 (10th Cir. 2003). Because the Government admitted they

did no trial preparations beyond preparing for the motion to suppress and Mr. Pace timely pleaded guilty and so did not waste the Government's or the court's resources, this Court should reverse the Twelfth Circuit's holding and rule that a motion to suppress evidence does not permit the district court to withhold the additional one level reduction for acceptance of responsibility under § 3E1.1(b).

A. § 3E1.1(b) is not discretionary, and the one level reduction is mandatory when a defendant satisfies the requirements under § 3E1.1(b).

This Court should rule that a defendant's offense level must be reduced by an additional one level if the defendant meets the requirements listed in § 3E1.1(b). The Government has limited discretion to determine whether a defendant's assistance allowed the it to avoid preparing for trial. *United States v. Divens*, 650 F.3d 343, 346 (4th Cir. 2011). However, once the Government has determined that they were not forced to prepare for trial, the Government must move for the district court to award the defendant the additional one point reduction. *Id.* If upon review of the Government's motion the district court agrees that the Government avoided preparing for trial, then the district court must grant the motion and award the defendant the reduction. *See* U.S.S.G. § 3E1.1 cmt n. 6. Neither the Government nor the district court have the discretion to refuse to award the reduction to a defendant who meets the requirements listed in § 3E1.1(b) and who has allowed the Government to avoid preparing for trial. *See Divens*, 650 F.3d at 346. Because both parties have stipulated that Mr. Pace met the first two requirements listed in § 3E1.1(b) and the Government admitted that it did not prepare for trial outside of opposing the motion to suppress evidence, this Court should reverse the Twelfth Circuit's holding that affirmed Mr. Pace's sentence without the benefit of the additional one level reduction he was entitled to.

1. The plain text and commentary to § 3E1.1(b) shows that the one level reduction is mandatory when the defendant has met the requirements listed in § 3E1.1(b).

This court should rule that the one level reduction under § 3E1.1(b) is not discretionary based on the plain text of the guideline and its commentary. The plain text contains both a discretionary portion (the Government must file a motion) and a mandatory portion (the offense level is decreased if all of the requirements are met). U.S.S.G. § 3E1.1(b); *see also Pace v. United States*, No. 20-1223, at 22 (12th Cir. 2020) (Widmore, J., dissenting). The Government's discretion is limited to interests identified in § 3E1.1(b)'s language. *See Divens*, 650 F.3d at 346. Commentary note 6 to § 3E1.1(b) clarifies what those interests are—"avoid[ing] preparing for trial" and efficiently allocating the Government's and court's resources. U.S.S.G. § 3E1.1 cmt. 6. These interests are satisfied when a defendant timely pleads guilty. *Id.* If a defendant qualified for a reduction under § 3E1.1(a) and his original offense level was at least 16, the additional one level reduction is mandatory unless the Government can justify its denial based on a § 3E1.1(b) interest. *See Divens*, 650 F.3d at 346 ("[O]nce the Government has determined that a defendant has 'tak[en] the steps specified in subsection (b),' he becomes entitled to the reduction.").

The 2003 PROTECT Act added the requirement that the Government must motion for the defendant to receive the additional one level reduction. *United States v. Vargas*, 961 F.3d 566, 574 (2d Cir. 2020). The narrowness of the Government's discretion is made clear by commentary note 6, which explains that the change was made "[b]ecause the Government is in the best position to determine whether the defendant has assisted authorities in a manner that *avoids preparing for trial*." U.S.S.G. § 3E1.1 cmt .6 (emphasis added). Far from granting the Government absolute discretion over a defendant's ability to receive the one level reduction under § 3E1.1(b), it merely shifted the responsibility of determining whether the § 3E1.1(b)

interests had been met from the district court to the Government, which is in a better position to assess their own expenditures of resources. This interpretation underlies the Fourth Circuit's reasoning in *Divens*, which found that the Government's discretion was limited to deciding whether the defendant's actions had relieved the Government from trial preparation. *See Divens*, 650 F.3d at 345–46. If the Government avoided trial preparations, then the defendant was entitled to the third point. *See Id.* at 346.

In this case, it is uncontested that Mr. Pace correctly received a reduction under § 3E1.1(a) and his original offense level was sixteen or higher. *Pace*, No. 20-1223 at 9. In addition, the Government admitted that they did not prepare for trial beyond their preparations for the motion to suppress. *Id.* at 24 (Widmore, J., dissenting). Nevertheless, the Government refused to move for the third point. This Court should follow the plain text of § 3E1.1 and the Fourth Circuit in *Divens* to hold that, unless the Government can show that preparing for a motion to suppress is the same as preparing for trial (this brief will show it cannot), then § 3E1.1(b) is mandatory, the Government should have moved for the additional one level reduction, and the district court cannot withhold it.

2. Amendment 775 is applicable and supports a mandatory reading of § 3E1.1(b).

This Court should rule that § 3E1.1(b) is mandatory under the language of Amendment 775. Amendment 775 states "[t]he Government should not withhold such a motion [for the additional one level reduction] based on interests not identified in § 3E1.1" and if the defendant meets the requirements of § 3E1.1(b), the "the court should grant the motion." U.S.S.G. § 3E1.1 cmt. 6; *Id.* supp. to app. C, amend. 775. This Court should follow the First, Fifth, Sixth, Eighth, and Eleventh Circuits and hold that Amendment 775 is controlling. *See United States v. Adair*, 38 F.4th 341, 360 n.28 (3rd Cir. 2022) (collecting cases). Such a holding would align with this

Court's decision in *Stinson v. United States*, which held that commentary to the Sentencing Guidelines Manual "is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." 508 U.S. 36, 38 (1993). The rule extends to amended commentary, despite it not being reviewed by Congress. *Id.* at 46.

While a review of the circuit courts provides an inconclusive picture of the exact limits on what the Government can consider, this Court should tie those limits to the core intention of § 3E1.1(b)—avoiding trial preparation and preserving the efficient use of the Government's and court's resources. *See United States v. Johnson*, 980 F.3d 1364, 1384 (11th Cir. 2020); *United States v. Rivera-Morales*, 961 F.3d 1 (1st Cir. 2020) ("Quintessentially, section 3E1.1(b) is meant to reward defendants who spare the Government the expense of trial . . . ."). This is reflected in the plain language of the Amendment. Before drafting Amendment 775, the Commission studied the language of the PROTECT Act and found "no congressional intent to allow decisions under § 3E1.1 to be based on interests not identified in § 3E1.1." U.S.S.G. supp. to app. C, amend. 775. On this basis, the text of Amendment 775 clearly states the "government should not withhold such a motion based on interests not identified in § 3E1.1." *Id.* Because Amendment 775 came in light of the PROTECT Act, which emphasizes *trial* resources, this Court should read Amendment 775, and § 3E1.1(b) generally, to limit the Government's discretion when motioning for the additional one level reduction to analyzing whether the defendant has caused the Government to expend trial resources.

The Twelfth Circuit suggested that Amendment 775 did not apply to Mr. Pace's case as the Amendment was limited to resolving a circuit split about whether the Government can withhold a motion for the one level reduction under § 3E1.1(b) because the defendant refused to waive his appellate rights. *Pace*, No. 20-1223 at 13. The court came to this conclusion by reading

Amendment 775 through the substantive canon *expressio unius est alterius*, which allows a court to assume that items not placed on a list were intentionally excluded from it. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). Because the limits on the Government's discretion in Amendment 775 were followed by "such as whether the defendant agrees to waive his or her right to appeal," the Twelfth Circuit opined the Amendment only resolved the specific issue of appellate waivers and was otherwise not applicable. *Pace*, No. 20-1223 at 13. That view, however, ignores this Court's prior holdings that the canon can be overcome by "contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives." *United States v. Vonn*, 535 U.S. 55, 56 (2002). There are clear indications that mentioning appellate rights did not signal any intention by the Commission to limit the Amendment's scope to that particular context. Applying *expressio unius* results in such an extreme narrowing of Amendment 775 that it renders the first half of the sentence ("should not withhold such a motion based on interests not identified in § 3E1.1") surplusage. U.S.S.G. § 3E1.1. supp. to app. C, amend. 775. This violates "the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant," as it transforms the broad language in the first half of the sentence into a specific order to not consider whether the defendant has signed a waiver of appellate rights. *Kungys v. United States*, 485 U.S. 759, 778 (1988). The Commission made clear that the Amendment should be applied broadly in their "Reasons for Amendment." The Commission stated "[i]n its study of the PROTECT Act, the Commission could discern no congressional intent to allow decisions under § 3E1.1 to be based on interests not identified in § 3E1.1." U.S.S.G. supp. to app. C, amend. 775. This plainly indicates the Commission's intentions for a broad reading of the Amendment, rather than one that constrains it to the limited context of appellate waivers. Both of these reasons provide ample

support for this Court to reject the Twelfth Circuit's use of *expressio unius* and to apply Amendment 775 to this case.

B. A defendant's motion to suppress cannot be the basis for the Government to refuse to motion for the additional one level reduction under § 3E1.1(b).

The core of this appeal is whether the Government or district court can refuse to award a defendant the one level reduction under § 3E1.1(b) because he filed a motion to suppress evidence. Persuasive case law and the plain language of the guideline make it clear that § 3E1.1(b) is designed to prevent the use of trial resources. The case law further suggests that opposing a motion to suppress is distinct from using trial resources. As such, a motion to suppress cannot be the basis on which a defendant is withheld the third sentencing point for acceptance of responsibility under Guideline § 3E1.1(b).

1. Preparing for a motion to suppress is not synonymous with preparing for a trial.

This Court should follow several circuits and hold that preparing for a motion to suppress and preparing for trial are not synonymous with each other. *See, e.g.*, *United States v. Marquez*, 337 F.3d 1203, 1212 (10th Cir. 2003); *United States v. Price*, 409 F.3d 436, 443 (D.C. Cir. 2005); *United States v. Kimple*, 27 F.3d 1409, 1414–15 (9th Cir. 1994); *Vargas*, 961 F.3d at 584. Preparing for trial requires significant work that goes far beyond what is required to oppose a motion to suppress. Even when there is considerable substantive overlap between the two proceedings, "preparation for a motion to suppress would not require the preparation of voir dire questions, opening statements, closing arguments, and proposed jury instructions, to name just a few examples." *Marquez*, 337 F.3d at 1212. This shows that there is simply much more that goes into preparation for trial than preparing for a motion to suppress, even when there is overlap in the content of the two proceedings.

Several circuit courts have identified this within their case law. In *Marquez*, the Tenth Circuit reversed the district court's refusal to award a one level reduction under § 3E1.1(b) because the defendant had "pleaded guilty only after a long suppression hearing that required the attendance of nearly all of the Government's witnesses." *Id.* at 1210. The Tenth Circuit's analysis focused on whether the defendant had pleaded guilty early enough so that the Government did not waste resources preparing for trial. *Id.* at 1212. Despite a "lengthy suppression hearing" that was attended by many of the witnesses who would have been at the trial, the Government admitted that they did not prepare for trial beyond the work done on the motion. *Id.* The Tenth Circuit found this was insufficient basis for the Government to refuse to move for the third point reduction, as trial preparations require additional work than a motion to suppress evidence, even when there is substantive overlap. *Id.* The Tenth Circuit held that

> [W]here a defendant has filed a non-frivolous motion to suppress, and there is no evidence that the Government engaged in preparation beyond that which was required for the motion, a district court may not rely on the fact that the defendant filed a motion to suppress requiring a "lengthy suppression hearing" to justify a denial of the third level reduction under § 3E1.1(b)(2).

Id.

In Mr. Pace's case, the Twelfth Circuit disagreed and held that the Government can choose to not move for the one level reduction under § 3E1.1(b) because it used resources to oppose Mr. Pace's motion to suppress. In support, the court cited to the Fifth and Second Circuits. Recent decisions in both of those circuits cast doubt on that position. While the Twelfth Circuit accurately pointed to the Fifth Circuit's long history of support, the Fifth Circuit recently indicated they would have considered deciding differently if not constrained by *stare decisis*. *See United States v. Longoria*, 958 F.3d 372, 376 (5th Cir. 2020) ("If we were writing on a blank slate, Longoria might have a compelling argument."). The Second Circuit has moved even

further from the position. Both the Twelfth Circuit in Mr. Pace's case and the Fifth Circuit in *Longoria* cite to *United States v. Rogers*, in which the Second Circuit ruled a district court could refuse to grant the one level reduction when "in terms of preparation by the Government and the investment of judicial time, the suppression hearing was the main proceeding in [the] case." 129 F.3d 76, 80 (2nd Cir. 1997). However, although it did not address *Rogers*, the Second Circuit recently explicitly adopted the Tenth Circuit's position in *Marquez* and ruled that a district court cannot deny the one level reduction under § 3E1.1(b) when the Government did not prepare for trial beyond a motion to suppress. *United States v. Vargas*, 961 F.3d 566, 584 (2nd Cir. 2020).

The *Marquez* decision is analogous to Mr. Pace's case and Mr. Pace is entitled to the third level reduction. Like the defendant in *Marquez*, Mr. Pace filed a non-frivolous motion to suppress that overlapped with evidence that would have been presented at trial. Despite the overlapping content, the Government in both *Marquez* and Mr. Pace's case admitted that it did not prepare for trial beyond the work done on the motion. Because a motion to suppress is not in and of itself equal to trial preparation, the Government has not shown that it prepared for trial. Therefore, since § 3E1.1(b) is designed to reward defendants who specifically allow the Government to avoid preparing for trial, Mr. Pace is entitled to the third point on the same grounds as the defendant in *Marquez*.

2. Mr. Pace's actions were not inefficient uses of the Government or the court's resources.

Mr. Pace timely notified the Government of his intention to plead guilty and did not cause an inefficient use of resources by either the Government or the court. What constitutes timely notice is not measured by days, weeks, or hours, but by how they functionally relate to the objectives of § 3E1.1(b). *See Kimple*, 27 F.3d at 1412. As such, a timely notice will ensure the

goals of the provision are realized, specifically that the defendant pleaded guilty early enough so that the Government avoided preparing for trial and both the Government and court were able to allocate their resources efficiently. *See Id.*; § 3E1.1. Efficient use of resources by the Government has a long history of being tied to whether it had to prepare for trial, an interpretation supported by the plain language of § 3E1.1(b). *See Kimple*, 27 F.3d at 1412; *United States v. Lee*, 653 F.3d 170, 174 (2d Cir. 2011).

Because the Government has admitted that it did not prepare for trial beyond the motion to suppress, and this brief has shown opposing a motion to suppress is not to be considered "trial preparation," the focus is on whether Mr. Pace allowed the court to allocate their resources efficiently. The text of commentary note 6 to § 3E1.1 indicates that the efficient use of court resources refers to scheduling decisions surrounding trial. U.S.S.G. § 3E1.1 cmt. 6. Because Government resources and court resources are part of the same phrase in that note, there is little indication that they are intended to refer to significantly different concepts. Additionally, commentary note 6 states "to qualify under subsection (b), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that… the court may schedule its calendar efficiently." *Id.* While a defendant cannot wait until the eve of trial to plead guilty, "where the proceeding is at the pretrial stage and the district court has not yet expended its resources, the guilty plea may still be timely." *Kimple*, 27 F.3d at 1413, 1415. Because Mr. Pace was nine days from his trial date and the case was still within the pretrial stage, the district court cannot be assumed to have expended trial resources before Mr. Pace pleaded guilty. Therefore, Mr. Pace's guilty plea was timely and was not an inefficient use of the Government's or the court's resources.

Applicant Details

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Applicant Education

BA/BS From	**Seattle University**
Date of BA/BS	**June 2016**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 12, 2023**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**The George Washington Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

M. Allie Schiele

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June 2, 2023

The Honorable Juan R. Sánchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1797

Dear Chief Judge Sánchez:

I am a recent graduate of The George Washington University Law School writing to apply for a clerkship in your chambers during the 2024-2025 term. I am specifically drawn to your chambers because of your strong background in legal aid and public defense. Additionally, I have the strong commitment to public interest work that you are seeking in your clerks. I believe that learning from an experienced jurist and litigator such as yourself would give me an invaluable opportunity to develop my skills as an attorney

My strong academic record and extensive federal litigation experience will allow me to make a valuable contribution to your chambers. At The George Washington University Law School, I was a Notes Editor for *The George Washington Law Review*, research assistant for three professors, and graduated in the top 15% of my class. Furthermore, I have experience in litigation at all stages of the judicial process through my internships with national advocacy organizations, including the ACLU and Electronic Frontier Foundation, as well as the U.S. District Court for the District of Columbia. Through these experiences, I learned that I thrive in the fast-paced environment of trial advocacy. Beginning in Fall 2023, I will be a Term Staff Attorney with the U.S. Court of Appeals for the Fourth Circuit, where I will continue to strengthen my litigation skills. Working in your chambers will allow me to gain crucial experience in litigation, which will allow me to become a stronger advocate for my future clients.

Enclosed please find my writing samples, resume, and transcript. Letters of recommendation from Professor Robert Brauneis, Professor Dawn Nunziato, and Americans United Legal Director Richard Katskee are included in my application. Please let me know if I can provide any additional information to assist with your decision. I can be reached by phone at (503) 807-9662 and by email at allieschiele@law.gwu.edu. Thank you for your time and consideration.

Respectfully,

Allie Schiele

M. Allie Schiele

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EDUCATION

The George Washington University Law School — Washington, D.C.
J.D. Candidate | 3.72 GPA (top 15%) — May 2023

Honors: George Washington Scholar; Levy First Amendment Fellowship
Activities: Notes Editor, Vol. 91, *The George Washington Law Review*; Author, Criminal Law Brief; Volunteer, International Refugee Assistance Project
Publications: *Learning from* Leaders*: Using* Carpenter *to Prohibit Law Enforcement Use of Mass Aerial Surveillance*, 91 Geo. Wash. L. Rev. Arguendo 14 (2023)

Seattle University — Seattle, WA
B.A. Political Science and Criminal Justice with a Specialization in Forensic Psychology, *magna cum laude* — June 2020

Honors: Naef Scholar (2019-2020); Trustee Scholarship
Activities: Executive Editor, *Seattle University Undergraduate Research Journal*; President, Model United Nations
Publications: *Framing Protestors: Description Bias in the Coverage of the Malheur National Wildlife Refuge and Charlotte Protests*, 2 Seattle U. Undergraduate Research J. 18 (2018).
Study Abroad: Paris, France (Art History); Rabat, Morocco (Colloquial Arabic and Political Science)

EXPERIENCE

U.S. Court of Appeals for the Fourth Circuit — Richmond, VA
Staff Attorney — Beginning August 2023

The George Washington University Law School — Washington, D.C.
Research Assistant, Professors Robert Brauneis, Dawn Nunziato, and Kate Weisburd — August 2022 – May 2023

- Provided research support for the Ethical Tech Initiative and publications in Law Review
- Coordinated a meeting with the Dutch Ministry of Justice to provide information on the ethical implications of artificial intelligence in the judiciary
- Created the Law Enforcement Surveillance Initiative to analyze how courts evaluate new surveillance technologies

Electronic Frontier Foundation — San Francisco, CA
Legal Intern — August 2022 – November 2022

- Conducted research and write memoranda on issues including online speech and Fourth Amendment searches
- Edited and substantiated amicus and appellate briefs on issues of copyright and surveillance
- Researched and wrote memoranda on novel First Amendment and Fourth Amendment issues

American Civil Liberties Union — New York, NY
Legal Intern, National Security Project — May 2022 – August 2022

- Wrote memoranda on Administrative Procedure Act, Establishment Clause, and Free Association Clause to support ongoing litigation for plaintiffs subjected to religious discrimination by Customs and Border Patrol
- Drafted a Freedom of Information Act request for documents held by Immigration and Customs Enforcement
- Conducted legal research on issues such as social media surveillance and the state secrets privilege

U.S. District Court for the District of Columbia — Washington, D.C.
Judicial Extern, The Hon. Barbara J. Rothstein — September 2021 – December 2021

- Prepared draft court orders, opinions, case summaries, and recommendations for Judge's use ruling on motions
- Conducted research and drafted memoranda on substantive and procedural legal issues, including the challenge to Washington state's vaccine mandate

Americans United for the Separation of Church and State — Washington, D.C.
Constitutional Litigation Intern — June 2021 – August 2021

- Wrote memoranda on constitutional and statutory issues pertaining to church-state separation, conducted prelitigation research, and participated in amicus strategy meetings
- Drafted part of an Issue Brief for the American Constitutional Society explaining the developments in First Amendment litigation pertaining to the ministerial exception

INTERESTS

Hosting trivia; hiking in the Pacific Northwest; collecting vinyl records; searching for the country's best coffeeshop

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

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Date Issued: 10-MAY-2023

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Admit Term: Fall 2020

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REFNUM:2980446

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Current Major(s): Law

GEORGE WASHINGTON UNIVERSITY CREDIT:

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2020			
Law School			
Law			
LAW 6202	Contracts Gabaldon	4.00	B+
LAW 6206	Torts Karshtedt	4.00	A
LAW 6212	Civil Procedure Gutman	4.00	A
LAW 6216	Fundamentals Of Lawyering I Mitchell	3.00	B+
Ehrs 15.00 GPA-Hrs 15.00 GPA 3.689			
CUM 15.00 GPA-Hrs 15.00 GPA 3.689			
THURGOOD MARSHALL SCHOLAR			
TOP 16% - 35% OF THE CLASS TO DATE			
Spring 2021			
Law School			
Law			
LAW 6208	Property Tuttle	4.00	A-
LAW 6209	Legislation And Regulation Roberts	3.00	A
LAW 6210	Criminal Law Braman	3.00	A
LAW 6214	Constitutional Law I Fontana	3.00	A-
LAW 6217	Fundamentals Of Lawyering II Mitchell	3.00	A-
Ehrs 16.00 GPA-Hrs 16.00 GPA 3.792			
CUM 31.00 GPA-Hrs 31.00 GPA 3.742			
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1%-15% OF THE CLASS TO DATE			

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2021			
Law School			
Law			
LAW 6380	Constitutional Law II Gavoor	3.00	B+
LAW 6520	International Law Steinhardt	4.00	B+
LAW 6657	Law Review Note	1.00	P
LAW 6668	Field Placement Mccoy	3.00	CR
LAW 6669	Judicial Lawyering Canan	2.00	A-
Ehrs 13.00 GPA-Hrs 9.00 GPA 3.407			
CUM 44.00 GPA-Hrs 40.00 GPA 3.667			
Good Standing			
THURGOOD MARSHALL SCHOLAR			
TOP 16% - 35% OF THE CLASS TO DATE			
Spring 2022			
LAW 6230	Evidence Pierce	3.00	A
LAW 6351	Reading Group Kohn	1.00	CR
LAW 6360	Criminal Procedure Saltzburg	4.00	B+
LAW 6399	Constitutional Law Seminar Mach	2.00	A
LAW 6657	Law Review Note	1.00	P
LAW 6870	National Security Law Gavoor	2.00	CR
Ehrs 13.00 GPA-Hrs 9.00 GPA 3.704			
CUM 57.00 GPA-Hrs 49.00 GPA 3.673			
Good Standing			
THURGOOD MARSHALL SCHOLAR			
TOP 16% - 35% OF THE CLASS TO DATE			

********** CONTINUED ON PAGE 2 **********

Katie Cloud
Interim University Registrar

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THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G49249484
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Date Issued: 10-MAY-2023

Record of: Mary A Schiele

Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2022			
LAW 6400	Administrative Law Glicksman	3.00	A-
LAW 6486	Information Privacy Law On Solove	3.00	A
LAW 6538	Immigration Law Benitez	3.00	A
LAW 6658	Law Review	1.00	CR
LAW 6667	Advanced Field Placement Mirko	0.00	CR
LAW 6668	Field Placement Mccoy	3.00	CR
Ehrs 13.00	GPA-Hrs 9.00	GPA	3.889
CUM 70.00	GPA-Hrs 58.00	GPA	3.707
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1%-15% OF THE CLASS TO DATE			
Spring 2023			
LAW 6218	Professional Responslbty/Ethic	2.00	A-
LAW 6232	Federal Courts	4.00	A-
LAW 6658	Law Review	1.00	CR
Ehrs 7.00	GPA-Hrs 6.00	GPA	3.667
CUM 77.00	GPA-Hrs 64.00	GPA	3.703
Spring 2023			
LAW 6342	Trusts And Estates	3.00	----------
LAW 6379	Criminal Law/Procedure Seminar	2.00	----------
LAW 6399	Constitutional Law Seminar	2.00	----------
	Credits In Progress:	7.00	

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	77.00	64.00	237.00	3.703
OVERALL	77.00	64.00	237.00	3.703

########## END OF DOCUMENT ##########

Katie Cloud
Interim University Registrar

This transcript processed and delivered by Parchment

June 02, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Allie Schiele, who I believe has applied for a clerkship with you. Ms. Schiele is an outstanding writer and a self-starter whose skills and enthusiasm will make her an exemplary law clerk, and I give her my highest and most enthusiastic recommendation.

I did not have Ms. Schiele in any of my classes, but she applied to be my research assistant, and I am extremely glad that she did. I hired her this past spring. In the meantime, she has worked with me on a number of projects connected with the Ethical Tech Initiative, a project that my colleague Dawn Nunziato and I run here at the George Washington University Law School. Ms. Schiele's work has been consistently impressive, and I would place her among the three or four best research assistants I have had in over 25 years of teaching.

The first project Ms. Schiele worked on (and continues to work on) is the "AI Litigation Database," which is an online database tracking litigation involving artificial intelligence from the filing of a complaint onwards. When Ms. Schiele started her work as a research assistant, there were a number of cases that we had identified but not yet entered into the database. She quickly wrote great summaries of those cases, and immediately understood all of the fields in the database and what information belonged in each of those fields. More importantly, she also quickly ran searches that located new cases; found their dockets in PACER or in the state equivalents; and entered those cases into the database as well. Perhaps most impressively, she made some excellent suggestions about changing the structure of the database, and we adopted those suggestions and changed the structure. Ms. Schiele is one of those people who always seem to be on the lookout for ways that they can contribute and make improvements, a trait that is rare even among top law students.

Another example of Ms. Schiele's work involves a meeting with representatives of the Dutch Ministry of Justice. The Dutch Embassy contacted us and explained that representatives of the Dutch Ministry of Justice was going to be visiting the United States and wanted to meet with us about the use of artificial intelligence in the justice system. Ms. Schiele took responsibility for organizing and setting the agenda for the meeting, and she became the de facto chair of the two-hour session. There were several professors in the room, as well as some senior representatives of the Dutch Ministry, and Ms. Schiele came across as every bit their equal – just as well-informed, and calm and confident without being presumptuous.

I am confident that Ms. Schiele is going to become a leading attorney in some area of law that involves cutting-edge technology, possibly criminal law or national security law, or the regulation of communications platforms. Her curiosity, analytical skills, and poise are going to take her very far. On her way to that career, she will be a great law clerk for the judge who is lucky enough to get her. As I said above, I give her my highest and most enthusiastic recommendation. If you interview her, I think you will see what I mean.

Yours sincerely,

Robert Brauneis

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June 02, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to recommend Allie Schiele to serve as your clerk. Allie was an intern for us at Americans United for Separation of Church and State in summer 2021. She is an excellent young lawyer who would serve you well.

Allie came to us with a demonstrated interest in public-interest law. We quickly learned that her passion is paired with the talent and thoughtfulness that make her a budding top-notch advocate. She is not just smart and skilled, but a person of character and maturity who would be a great addition to your chambers.

Before I tell you why that is so, let me say a bit about myself. For the past two-and-a-half decades I have practiced principally in the U.S. Supreme Court and federal courts of appeals nationwide. I spent approximately a decade (in two stints) as a member of the Supreme Court and Appellate Practice at Mayer Brown LLP; longer yet at Americans United (also in two terms); and a couple of years managing the division that serves as legal counsel to the Assistant Secretary for Civil Rights in the U.S. Department of Education. In those positions, I have had the good fortune to work with, hire, and supervise some of the most talented young lawyers in the country. And having started my career as a clerk to Judges Guido Calabresi and Stephen Reinhardt and participated in their hiring of my successors, I learned early on what to look for in judicial clerks.

Over the course of her summer with us, Allie worked on a host of projects that showcased the skills and qualities that would make her an excellent clerk.

Allie's first and most substantive project was a lengthy memorandum that addressed complex issues of employment retaliation under the Americans with Disabilities Act and Section 1983. A volunteer firefighter had contacted us about retaliation after he complained about prayer at departmental meetings. Allie's memo analyzed the strength of the potential claim and the difficult legal question whether the claimant's status as a volunteer firefighter foreclosed his claims. In the words of our Associate Legal Director, Allie's "writing was very clear, well-organized, and flowed very well. She unearthed a great deal of useful information through her research. Her research made a major contribution to what ultimately turned out to be a solid nonlitigation success."

Allie also helped us with an Issue Brief that a colleague and I are writing for the American Constitution Society. The Issue Brief (which has been delayed because of our heavy caseload) addresses a thorny area of First Amendment jurisprudence—the judicially created ministerial exception. That doctrine, which is rooted in the First Amendment's two Religion Clauses, frees religious employers from liability for workplace discrimination against employees who perform important religious functions. We asked Allie to research and draft a history of the doctrine, which required digging through 50 years of caselaw and synthesizing the reasoning of courts across the country. And that is precisely what Allie did. As with all her other work, her writing was exceptionally clear, her research thorough, and her conclusions sound.

The trait of Allie's that stood out most to me is also the thing about which I am most persnickety: legal writing. Allie is a strong, effective writer, head and shoulders above not only her classmates but also many practicing lawyers. She writes clearly and concisely, and she does not fill her prose with legal jargon. Her writing is confident without being aggressive. And most importantly, it's convincing. I am sure that you will find her memos and draft opinions a pleasure to read and edit.

I know, however, that hiring a clerk is more than just searching for someone who can do high-quality legal work—though that ability is an essential prerequisite. It is adopting a new member of the judicial family—a person with whom you and your staff will spend countless hours. Allie is a pleasure as a colleague—she's positive, enthusiastic, and eager. In her time with us, she approached issues with intellectual curiosity, jumped at every opportunity to partake in discussions with clients and coalition partners or to work on legal issues that were new to her. And she is committed to a career in public service, so she will drink in everything that she learns from you and put it to work to benefit others.

Allie would be a wonderful clerk. I welcome the opportunity to talk more with you or your staff about why that is so. Please don't hesitate to contact me at (202) 466-7304 or katskee@au.org.

Sincerely,

Richard B. Katskee
Vice President and Legal Director

June 02, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write on behalf of Mary "Allie" Schiele in support of her application for a judicial clerkship in your chambers. As her professor at The George Washington University Law School, I have had the pleasure of teaching Allie in my Advanced Free Speech seminar, as well as supervising her work as a Research Assistant. I have witnessed Allie's growth and development both inside and outside the classroom, and I believe that Allie possesses the qualities that will make her a wonderful clerk.

Allie has been an outstanding student. She is intelligent, diligent, and dependable, and has demonstrated a deep understanding of the law and a passion for the pursuit of justice. She has consistently ranked in the top 15% of her class, served as an editor of The George Washington Law Review, and is a twice-published author, which further exhibits that she achieves a high level of academic excellence, has excellent legal research and writing skills, and has a strong commitment to the study of law. As I observed in my classroom, Allie possesses a remarkable ability to analyze complex legal issues, articulate arguments persuasively, and offer creative solutions to pressing legal problems. Her contributions to our class discussions were always insightful and reflected a deep understanding of complex and nuanced issues in the law. Allie's final paper for my seminar reflected the strength of her class contributions and exhibited her talent for legal writing and analysis.

I was first introduced to Allie through her work with our Ethical Tech Initiative at GW Law, which I co-direct. In our time working together, I have observed Allie approach every task with meticulous attention to detail, comprehensive research, and excellent legal writing. She also frequently took initiative on projects assigned to her – and created some of her own. Allie initiated our Ethical Tech Law Enforcement Surveillance Initiative, which analyzes cases related to advanced technology and the Fourth Amendment. She built this project from the ground up, combining her talent in legal research and writing with her passion for justice. Allie's ability to take initiative on projects was further exemplified when she took the lead on presenting Ethical Tech's access to justice research to a visiting delegation from the Dutch Ministry of Justice. During the Dutch Ministry's visit, Allie demonstrated her ability to synthesize and distill complex legal principles into clear and concise language for lawyers and non-lawyers alike. Allie's ability to effectively communicate complex issues of advanced technology, national and international legal doctrines, and bias in artificial intelligence is a testament to her exceptional communication skills and intellectual acumen. She is a joy to work with, and a highly valued member of our team.

What truly sets Allie apart from her colleagues is her unwavering commitment to justice. Allie's work experience with prestigious public interest nonprofit organizations is a testament to her dedication to civil rights and liberties. She not only exhibited this passion through her professional work and position with Ethical Tech, but she also has shown this commitment through her pro bono work with the International Refugee Assistance Project. I am confident that Allie has a deep understanding of the inequities in our legal system, and will use her prodigious abilities to address these challenges through legal advocacy. She approaches her work with a sense of integrity and professionalism, and I believe she would do the same in your chambers.
In summary, Allie is an outstanding student, with exceptional legal skills and a deep commitment to justice. Her intellectual abilities, strong moral compass, and depth of experience make her an excellent candidate for a judicial clerkship. It is without any hesitation that I recommend her for a judicial clerkship. If you would like to speak further about Allie's qualifications, please do not hesitate to contact me.

Thank you for your time and consideration of Allie's application for a judicial clerkship.

Sincerely,

Dawn C. Nunziato
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Allie Schiele

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Writing Sample

The attached writing sample is an internal memorandum I drafted as an intern with the Electronic Frontier Foundation (EFF). I was asked to evaluate whether EFF could bring a pre-enforcement challenge to a federal law limiting online abortion speech. This work is entirely my own. The memo incorporates feedback from the assigning attorney, but has not been substantively edited by another party. I have obtained permission to share this work as a writing sample.

To: Jennifer Pinsof
From: Allie Schiele
Re: Comstock Act Post-*Dobbs*
Date: 9/22/2022 [Updated 10/19/2022]

INTRODUCTION

Earlier this year, the Supreme Court reversed *Roe v. Wade* and revoked the constitutional right to an abortion. *See Dobbs v. Jackson Whole Women's Health*, 142 S. Ct. 2228 (2022). This shocking decision created many unanswered questions surrounding abortion-related statutes and legal precedents. Included in this uncertainty is a historically unenforced provision of the Communications Decency Act—described in this memo as the "Hyde-Comstock Provision"—which prohibits the transmission of abortion-related information on the internet, among other things. This memo explores the history of this provision, previous challenges in federal court, and how courts will likely handle a challenge to this provision today.

QUESTION PRESENTED

Can a plaintiff bring a pre-enforcement challenge to the Hyde-Comstock Provision of the CDA?

SHORT ANSWER

No. At this time, a pre-enforcement challenge is likely to fail. Just as the original challenge to the Hyde-Comstock Provision, *Sanger v. Reno*, there is no credible threat of prosecution. Under both standing and ripeness doctrines, there must be a credible fear that one would be prosecuted under the statute in the immediate future in order to obtain pre-enforcement review. Even though the state of abortion law is more uncertain after *Dobbs*, no person has been prosecuted or threatened with prosecution under this provision. Without more, the injury-in-fact requirement of standing is not met, nor are the requirements for ripeness.

BACKGROUND

I. History of the Hyde-Comstock Provision

In 1996, President Bill Clinton signed into law the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (1996). Within Title V of the Telecommunications Act is the Communications Decency Act ("CDA"), which was enacted to allow the government to protect minors from pornographers and pedophiles. The CDA criminalized the transmission of indecent material over public computers, with violators subject to a fine and prison sentences of up to five years for a first-time offense. 47 U.S.C. §§ 223, 230.

Buried within the CDA is the Hyde-Comstock Provision, added by famous anti-choice congressman Rep. Henry J. Hyde,[1] which amends the Comstock Act of 1873. Act of March 3, 1873, ch. 258, § 2, 17 Stat. 599 (1873). The Comstock Act regulates the transport of "obscene" materials—including information and materials related to abortion.[2] The Hyde-Comstock Provision essentially modernized the Comstock Act by making it applicable to internet communications. The Hyde-Comstock-Act provides:

> *Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier or interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934), for carriage in interstate or foreign commerce* [. . .]
>
> > *(c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or*
>
> *Whoever knowingly takes or receives, from such express company or other common carrier or interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934) any matter or thing the carriage or importation of which is herein made unlawful--*
>
> *Shall be fined under this title or imprisoned not more than five years, or both, for the first such offense and shall be fined under this title or imprisoned not more than ten years, or both, for each such offense thereafter.* 18 U.S. § 1462.

The purpose behind the Hyde-Comstock Provision is unclear, as the legislative record is contradictory. In initial debate over the Telecommunications Act, Rep. Hyde denied that the bill would "inhibit free speech about . . . abortion," but later inserted the provision doing exactly what he had earlier denied.[3] Although the provision was barely noticed during congressional debate,

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[1] *See* Melissa Gira Grant, *A Forgotten 1990s Law Could Make it Illegal to Discuss Abortion Online*, New Republic (Aug. 1, 2022) https://newrepublic.com/article/167178/ 1990s-law-abortion-online-illegal-cda.

[2] The Comstock Act was based on legislation passed in 1865 that targeted the phenomenon of citizens mailing Civil War soldiers "naughty photographs." Later, in 1873, conservative representative Anthony Comstock shepherded the passage of the Comstock Act that further tightened these obscenity restrictions, including anti-smut and anti-abortion provisions. *See* John Schwartz, *Abortion Provision Stirs Online Furor*, The Washington Post (Feb. 9, 1996) https://www.washingtonpost.com/archive/business/1996/02/09/abortion-provision-stirs-on-line-furor/875a2c8e-2407-42e8-a0bd-e9f658a8f712/.

[3] *See* Gira Grant, *supra*.

Hyde defended the provision when it was addressed during debate, downplaying its impact on free speech.[4]

When the Telecommunications Act was signed into law, President Clinton expressed that his administration would not enforce the Hyde-Comstock Provision. *See* Sheryl L. Herndon, *The Communications Decency Act: Aborting the First Amendment?*, 3 Rich. J.L. & Tech. 2 (1997). Specifically, he stated that the Department of Justice had a "long-standing policy that this and related abortion provisions in current law are unconstitutional . . . because they violate the First Amendment." *Sanger v. Reno*, 966 F. Supp. 151, 158 (E.D.N.Y. 1997) (quoting President Clinton's statement). Attorney General Janet Reno also expressed that she would not enforce this provision. *Id.* (citing a letter from Attorney General Reno outlining the Department of Justice's policy).

II. Previous Cases Challenging the Hyde-Comstock Provision

In response to the passing of the CDA, two lawsuits were raised that challenged the Hyde-Comstock Provision—*Sanger v. Reno* and *ACLU v. Reno*.

In *Sanger v. Reno*, abortion advocacy organizations and individuals impacted by the CDA[5] sued then-Attorney General Janet Reno, seeking a declaration that the Hyde-Comstock Provision is unconstitutional and requesting an injunction barring its enforcement. 966 F. Supp. at 155. The plaintiffs claimed that they intended to use computers to transmit or receive information about abortions in violation of the statute. *Id.* Before reaching the merits, the district court considered whether the case was ripe and therefore justiciable under Article III. *Id.* at 159. The court did not decide the First Amendment issue in the case, instead holding that the case did not meet the standards of ripeness. *Id.* at 160–61. Specifically, plaintiffs did not provide sufficient proof that they had a credible fear of enforcement. *Id.*

In holding that the plaintiff's case was not ripe, the court focused on the two considerations of ripeness: whether the issues are fit for judicial resolution and whether there would be hardship to the parties in withholding judicial resolution. *Id.* at 160. The court first found that the issues created by Hyde-Comstock Provision were fit for judicial decision, in part because further factual development was not necessary. *See id.* Furthermore, both parties agree that the Hyde-Comstock Provision was on its face "unconstitutionally violative of First Amendment rights." *Id.*

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[4] *Id.*

[5] Plaintiffs included the President of Planned Parenthood Alex Sanger, California Abortion and Reproductive Rights Action League, NARAL, Feminist Majority Foundation, National Abortion Federation, and Medical Students for Choice. Other individual plaintiffs included Professor Rhonda Copelon, who was a law processor who researched abortion, and Adam Guasch-Melendez, who hosted a website containing information about how to receive an abortion.

However, the district court found that withholding resolution would not create a hardship to the parties. *Id.* at 161. When assessing hardship to the parties, courts consider "whether the challenged action creates a direct and immediate dilemma for the parties." *Id.* According to the district court, the plaintiffs did not meet this requirement. *Id.* at 161. First, the provision had never been enforced and government officials had repeatedly assured that they would not enforce this law. *See id.* Second, the court rejected the plaintiff's argument that because abortion issues are so controversial, there is an "ever-present" danger of enforcement. *Id.* Mere uncertainty "does not establish a credible basis for fearing enforcement, much less a likelihood of enforcement." *Id.* Third, even affirmative steps by Congress to extend the scope of the statute did not give rise to a credible fear of enforcement, because enforcement of the law is within the purview of the Executive—not Congress. *Id.* at 162. Because the Attorney General announced her intention to not prosecute those who violate the Hyde-Comstock Provision, it did not matter if Congress expanded the scope of the statute. *Id.*

Finally, the court held that there was no chilling effect that would make the case ripe, as there was no evidence that the statute would have "an immediate and concrete effect." *Id.* at 163. Even though the plaintiffs argued that the provision would be used "as pretext or justification by Internet access providers . . . to place restrictions on abortion speech," the plaintiffs did not provide any factual showing that internet providers would limit the dissemination of abortion speech as a result of the statute. *Id.* The court found that the plaintiffs' argument was "improbable and not technically feasible." *Id.* The chilling effect was further unlikely because plaintiffs could easily publish abortion information on their own websites, circumventing the need for a third party. *See id.* at 163–64.

All these factors considered, the court held that the plaintiffs could not establish a credible fear of enforcement, thus failing to meet the second part of the ripeness test. *Id.* at 165. However, the court noted that if the government changed its position on non-enforcement of the statute, not only would due process require advance public notice, but the plaintiffs would also likely be able to proceed with their pre-enforcement challenge. *See id.* at 164–65.

In the second case, *ACLU v. Reno*, organizations and individuals who were associated with the computer and/or communications industries or publish information on the internet[6] sued to challenge two provisions of the CDA. *See* 929 F. Supp 824, 827 (E.D. Pa. 1996). The first was the provision regulating communications of "obscene or indecent" material, and the second regulated "patently offensive material." *Id.* at 829. Although the plaintiffs also challenged the Hyde-Comstock Provision, the government did not contest this challenge. *Id.* After the government noted its position of no-contest in its opposition brief, the plaintiffs informed the court in a post-hearing

[6] Plaintiffs included the ACLU, Human Rights Watch, EPIC, EFF, Journalism Education Association, Computer Professionals for Social Responsibility, National Writers Union, ClariNet Communications Corp., Institute for Global Communications, Stop Prisoner Rape, Inc., AIDS Education Global Information System, Bibliobytes, Queer Resources Directory, Critical Path AIDS Project, Inc., Wildcat Press, Inc., and Planned Parenthood Federation of America, Inc.

brief that they no longer sought a preliminary injunction for the Hyde-Comstock provision. *Id.* at 928 n.7.[7]

Many factors have changed since these cases were decided nearly three decades ago. Mainly, the lack of constitutional protection for abortion raises the question of whether the reasoning of these decisions stand today. This memo attempts to answer this question by discussing whether plaintiffs have standing in a modern abortion rights paradigm. It evaluates issues of ripeness and standing, ultimately concluding that a potential plaintiffs will still not be able to bring a pre-enforcement challenge the Hyde-Comstock Provision because there is no imminent threat of enforcement.

ANALYSIS

I. Plaintiffs do not have a claim that is sufficient to assert a pre–enforcement challenge.

Pre-enforcement review allows plaintiffs to challenge the constitutionality of a rule before it is enforced. *See* Josh Newborn, *An Analysis of Credible Threat Standing and* Ex Parte Young *For Second Amendment Litigation*, 16 Geo. Mason L. Rev. 927, 928 (2009). Although Article III of the Constitution limits courts to presiding over actual cases or controversies, pre-enforcement review is allowed when plaintiffs can demonstrate that the law has a substantial risk of being enforced, or when the law is presently injuring the litigant. *See Kerin v. Titeflex Corp.*, 770 F.3d 978, 981 (1st Cir. 2014); *see also Navegar, Inc. v. United States*, 103 F.3d 994, 999 (D.C. Cir. 1997) (noting that courts frequently allow pre-enforcement challenges when the statute chills First Amendment rights). Plaintiffs must meet the Article III requirements that confine courts to deciding actual cases or controversies. *See Nat'l Rifle Ass'n v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997).

From Article III's case or controversy requirement stems a number of justiciability doctrines—namely standing and ripeness. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157–58 (articulating the Article III origins of standing); *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 138 (1974) ("Issues of ripeness involve, at least in part, the existence of a live 'Case or Controversy'"). Standing doctrine allows courts to properly "identify those disputes which are appropriately resolved through the judicial process." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, plaintiffs must show 1) an injury-in-fact; 2) that is fairly traceable to the defendant's conduct; and 3) is able to be redressed by the requested relief. *See Lujan*, 504 U.S. at 560–61. Pre-enforcement challenges mainly implicate the injury-in-fact requirement because in this context, courts must determine if the injury asserted by the plaintiff is appropriately imminent to give rise to standing.

[7] The court ultimately found that under strict scrutiny, other provisions of the CDA were unconstitutional as they were not narrowly tailored. *Id.* at 857. This case was later appealed to the Supreme Court, which confirmed the district court's decision. *See Reno v. ACLU*, 521 U.S. 844, 849 (1997).

Ripeness, however, refers to the court's determination if a case is too premature for adjudication. *See FPL Energy Maine Hydro LLC v. F.E.R.C.*, 551 F.3d 58, 61–62 (1st Cir. 2008); *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) ("Ripeness is peculiarly a question of timing designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract agreements) (internal quotation marks omitted). When evaluating ripeness, courts consider whether 1) the case is fit for judicial resolution and 2) whether there would be undue hardship to any party if the court withheld consideration. *See Thomas*, 220 F.3d at 1138.

"Sorting out where standing ends and ripeness begins is not an easy task." *Id.* To simplify, standing focuses on whether the injury is sufficient to satisfy Article III requirements of creating a case or controversy, whereas ripeness centers on whether the case or controversy has occurred. *See* Erwin Chemerinsky, *A Unified Approach to Justiciability*, Conn. L.Rev. 677, 681 (1990) (arguing that the separate tests are "overlapping and unnecessary" and it could easily be consolidated with standing doctrine). Even though these are two separate doctrines, the distinction between these two doctrines is often blurred—especially in cases where the court is asked to evaluate "whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical." *See* Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. Chi. L.Rev 153, 172 (1987); *see also Thomas v. Anchorage Equal Rights Com'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) ("[I]n many case, ripeness coincides squarely with standing's injury in fact prong").

Although courts often decide pre-enforcement cases on either standing or ripeness, many courts recognize that the analysis of these two doctrines in the pre-enforcement context is essentially the same. *See Susan B. Anthony*, 573 U.S. at 157 n.5 (noting that issues of standing and ripeness in the pre-enforcement context essentially "boil down to the same question"); *Thomas*, 220 F.3d at 1139 ("We need not delve into the nuances of the distinction between the injury in fact prong of standing and the constitutional component of ripeness: in this case, the analysis is the same").

Differences aside, both doctrines require courts to ensure there is a "definite and concrete, not hypothetical or abstract" issue. *See Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945). "Neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy requirement'" under either standing or ripeness. *See Thomas*, 220 F.3d at 1139. In fact, both doctrines require that there be a genuine threat of enforcement in order for a court to grant pre-enforcement review. *See id.* This memo thus proceeds by collapsing ripeness analysis into the injury-in-fact requirement of standing, focusing on the credible fear of enforcement element required by both.

A. Plaintiffs will not be able to satisfy the injury-in-fact requirement of standing.

To mount a successful pre-enforcement challenge, plaintiffs must meet the requirements of standing. Pre-enforcement challenges primarily concern the injury-in-fact requirement, as courts

must evaluate whether the plaintiff has sufficiently asserted an injury that is "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* at 560. Allegations that an injury is "certainly impending" or that there is a "substantial risk" that the harm will occur may be sufficient to confer standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013). The party that invokes federal jurisdiction has the burden of establishing standing. *See Susan B. Anthony List*, 573 U.S. at 157.

"[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Instead, plaintiffs can bring a pre-enforcement challenge when the plaintiff "has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest . . . and there exists a credible threat of prosecution thereunder." *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979); *see Stoianoff v. Montana*, 695 F.2d 1214, 1223 ("[t]he mere existence of a statute, which may or may not even be applied to plaintiffs, is not sufficient to create a case or controversy"). The requirements for pre-enforcement standing can be distilled into a four-part test, where a plaintiff must prove: 1) they intend to engage in the conduct; 2) the conduct is affected by a constitutional interest; 3) the conduct is proscribed by the statute; and 4) there is a credible threat of prosecution. *See Babbitt*, 442 U.S. at 298.

The first three elements are easily met in a challenge to the Hyde-Comstock Provision and do not warrant much discussion. Ideally, this challenge will be brought on behalf of a plaintiff that intends to spread information about abortion services online, satisfying the first element. Additionally, online speech is protected by the First Amendment, so proving that a constitutional interest affects this conduct will be easily satisfied. Finally, online speech that touches on abortion information is explicitly proscribed by the Hyde-Comstock Provision, meeting the third element. The fourth element—credible threat of prosecution—poses a more complicated analysis for a challenge to the Hyde-Comstock Provision.

To meet element four of the *Babbitt* test, a plaintiff must show that their fear of prosecution is not "imaginary or wholly speculative." *See Babbitt,* 442 U.S. at 302; *see also Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988) (allowing pre-enforcement review because plaintiffs had "alleged an actual and well-founded fear that the law will be enforced against them."); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16 (2010) (finding standing because the plaintiffs faced a credible threat of enforcement after the government had already charged 150 persons for violating the statute and did not state that it would not seek future prosecutions). The sole possibility that criminal penalties could apply does not, in itself, create a case or controversy. *See Boating Industry Ass'ns v. Marshall*, 601 F.2d 1376, 1384 (9th Cir. 1979). Instead, there must be a "high degree of immediacy" to have standing when fear of prosecution is the only harm. *San Diego Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1127 (9th Cir. 1996). Factors considered by courts include: whether the government has denounced intention to pursue enforcement of the statute, whether there is a history of enforcement, and if plaintiffs plan to engage in the prohibited conduct in the future. *See Susan B. Anthony List*, 573 U.S. at 152–67; *Sanger*, 966 F. Supp. at 161–

67; *Holder*, 561 U.S. at 15–16. Factors that courts do not find persuasive include uncertainty of the proscribed conduct's legality in the future and steps by the legislature to expand the scope of the statute being challenged. *See Sanger*, 966 F. Supp. at 161–62.

If the government denounces its intention to prosecute under the challenged statute, a credible threat of enforcement is unlikely to exist. For example, in *Susan B. Anthony List*, the Supreme Court approved a pre-enforcement challenge to an Ohio statute criminalizing false statements about political candidates. *See* 573 U.S. at 152. One plaintiff-organization in the case argued that it wanted to make statements about a candidate's support for the Affordable Care Act and its alleged relationship to tax-payer-funded abortion. *Id.* at 153–54. However, the organization stated that it refrained from doing so because of the Ohio law and a hearing from the Ohio Election Commission against an organization that made similar statements. *Id.* The Supreme Court found that the plaintiffs properly proved a credible threat of enforcement, in part because the Commission had not disavowed prosecution under the statute. *Id.* at 165. This was sufficient to support the plaintiffs' claim that future enforcement was not "imaginary or speculative." *Id.*

A similar pre-enforcement claim existed in *Holder v. Humanitarian Law Project*, where the Supreme Court was asked to evaluate a criminal ban on providing "material support" to foreign terrorist organizations. 561 U.S. at 1–2. The Court granted pre-enforcement review, and similarly to *Susan B. Anthony List*, factored into its analysis that "[t]he Government ha[d] not argued to this Court that plaintiffs will not be prosecution if they do what they say they wish to do." *Id.* at 16.

In contrast, in *Sanger*, the government's public statements that it would not pursue prosecution under the statute led the district court to find that there was no such credible fear of enforcement. First, when the CDA was signed into law, President Clinton stated that he objected to the Hyde-Comstock Provision and that the Department of Justice "will continue to decline to enforce that provision of current law . . . as applied to abortion-related speech." *Sanger*, 966 F. Supp. at 158. Attorney General Janet Reno also publicly stated that the DOJ would not enforce the provision. *Id.* Without evidence that the Attorney General would reverse its stance on nonenforcement, there could be no impending threat of prosecution. *Id.* at 161.

Both *Susan B. Anthony List* and *Holder* also found that the strong history of enforcement gave rise to a credible threat of enforcement. In *Susan B. Anthony List*, not only was there a history of enforcement for the false statement statute, but one of the plaintiffs had already been the subject of a complaint under the statute. 134 U.S. at 164. The Court noted that "past enforcement against the same conduct is good evidence that the threat of enforcement is not "chimerical." *Id.* (internal quotation marks omitted). The threat in this case was amplified because the Ohio Commission already found probable cause that the plaintiff's speech violated the false statement statute. *Id.* Further, the Ohio Commission handled anywhere from twenty to eighty false statement complaints per year, indicating that enforcement was not rare. *See id.* at 164–65. Similarly, in *Holder*, the government had already prosecuted 150 people for violations of the law plaintiffs were

challenging. 561 U.S. at 15. The Court found that this factor supported the plaintiffs' fear of prosecution, especially because the government did not disclaim prosecution under the statute. *Id.* at 15–16.

Like the intention to prosecute factor, the history of enforcement was lacking in *Sanger*. In fact, the district court noted that "[i]n the 99 years since [the enactment of the original statute], there have been no reported decisions reflecting the use of [the statute] to prosecute abortion-related speech." *Id.* at 157. The lack of enforcement of the statute in its original and its updated version including online speech, coupled with the express policy of nonenforcement, was enough for the district court to determine that there was no immediate threat of enforcement. *Id.* at 161–62.

In all three cases discussed above, the plaintiffs planned to engage in the proscribed behavior in the future, another factor weighing in support of a credible fear of enforcement. In *Susan B. Anthony List*, the plaintiffs planned to "engage in substantially similar activity in the future." 573 U.S. at 161. Further, their future conduct would be "proscribed by [the] statute." *Id.* at 162. In *Sanger*, the district court also found that the plaintiffs' planned to continue their engagement in abortion speech in the future, and that this conduct was prohibited by the statute that was being challenged. *Sanger*, 966 F. Supp. at 161–67. This consideration, however, did not outweigh the other factors enough to find a credible fear of enforcement.

Sanger outlined two other considerations that factored against a finding of a credible fear. First, mere uncertainty about the future of conduct related to the statute will not in itself give rise to a credible threat of enforcement. *Id.* at 161. The plaintiffs argued that "emotionally-charged and controversial nature of abortion issues . . . places them in 'ever-present' danger of enforcement." *Id.* at 161. The district court, however, rejected this argument. *Id.* Instead, the district court held that "uncertainty about enforcement does not establish a credible basis for fearing enforcement, much less a likelihood of enforcement." *See id.* at 161.

Second, steps to amend the scope of the challenged statute does not increase the likelihood of enforcement. *Id.* According to *Sanger*, proposals from Members of Congress did not give rise to a credible fear of enforcement because it is the responsibility of the executive branch—not Congress—to enforce the law. *Id.* at 161–62. Because the executive announced its intention to not enforce the law, efforts by Congress to broaden the scope of the Hyde-Comstock provision did not support a credible fear of enforcement. *Id.* at 162.

At present, there is no credible threat of prosecution under the Hyde-Comstock Provision. First, similar to the original challenge in *Sanger*, no one has been prosecuted or threatened with prosecution since this statute was first enacted. Unlike *Holder* and *Susan B. Anthony*, where there was a history of enforcement, no individual has been prosecuted or threatened with prosecution under the statute. Especially since the Hyde-Comstock Provision was codified over twenty years

ago, there is not a similar sense of impending enforcement that makes a pre-enforcement claim actionable, even with the lack of constitutional protection for abortion.

Second, the subsequent presidential administrations and the DOJ have not changed its nonenforcement position. Although the current Attorney General has not made a statement similar to Attorney General Janet Reno, it is likely that this policy is still in force. In part, this is because a reversal of the agency's policy would require public notice to satisfy due process requirements. *See Sanger*, 966 F. Supp. at 164. Additionally, Attorney General Merrick Garland has commented that the DOJ "will be relentless in [the Department's] efforts to protect and advance reproductive freedom," indicating that the DOJ will maintain the nonenforcement policy.[8]

Third, even though abortion is no longer a constitutionally protected right, uncertainty about the state of abortion protections is not sufficient to find a credible threat of enforcement. *Sanger* rejected the argument that the highly political and rapidly changing nature of this issue is sufficient to assert a credible threat of prosecution, as "uncertainty about enforcement does not establish a credible basis for fearing enforcement, much less a likelihood of enforcement." *See Sanger*, 966 F. Supp. at 161.

Even the proposals for laws similar to the Hyde-Comstock Provision do not support a finding of a credible fear of enforcement. Take the proposed legislation in South Carolina, for example. Earlier this year, Republican state legislators in South Carolina proposed a bill that would have criminalized assisting someone in procuring an abortion, including by "providing information to a pregnant woman . . . by telephone, internet, or any other mode of communication."[9] Although this bill did not pass, there are many other efforts to criminalize abortion-related speech in state legislatures.[10] The South Carolina bill itself was based on a model bill by the National Right to Life Coalition and is likely to be introduced in other states. Yet, in *Sanger*, the court rejected the argument that discussion of extending the impact of the Hyde-Comstock Provision created a credible threat of prosecution. *See Sanger*, 966 F. Supp. at 161.

All factors considered, if a plaintiff sought pre-enforcement review of the Hyde-Comstock Provision today, courts are unlikely to find that there is a credible fear of enforcement that is sufficiently impending. Even though *Dobbs* significantly changed the legal landscape of abortion rights, the executive branch's policy of non-enforcement still stands. And further, there has yet to

[8] *Attorney General Merrick Garland Delivers Remarks for Reproductive Rights Taskforce*, Dep't of Justice (Aug. 3, 2022) https://www.justice.gov/opa/speech/attorney-general-merrick-garland-delivers-remarks-reproductive-rights-taskforce.
[9] Victoria Hansen, *Abortion Rights Advocates Brace for Tougher Ban as Lawmakers Reconvene*, South Carolina Public Radio (Aug. 30, 2022) https://www.southcarolinapublicradio.org/sc-news/2022-08-30/abortion-rights-advocates-brace-for-tougher-ban-as-lawmakers-reconvene.
[10] *See* Paige Collings, *Victory! South Carolina Will Not Advance Bill That Banned Speaking About Abortions Online*, EFF (Aug. 26, 2022) https://www.eff.org/deeplinks/2022/08/victory-south-carolina-will-not-advance-bill-banned-speaking-about-abortions

be a single known prosecution under the provision. Until one of these factors changes, a pre-enforcement challenge will likely fail.[11]

CONCLUSION

A pre-enforcement challenge to the Hyde-Comstock Provision is not likely to be successful at this time. Although courts will agree that this law is unconstitutional, there still must be a credible threat of enforcement in order to have standing or for the claim to be ripe. If at some point in the future, the Department of Justice drops its commitment to non-enforcement or a member of the Executive Branch threatens prosecution, a pre-enforcement challenge will be viable. Until this point, a challenge similar to the one in *Sanger* will not be successful.

[11] Under ripeness analysis, a claim may be ripe if First Amendment rights have been chilled by the challenged statute. *See Sanger*, 966 F. Supp. at 162; *ACLU v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973). This, however, stands apart from pre-enforcement analysis. Instead, if a chilling effect is found to exist, the case will be ripe. Still, the chill on the plaintiffs' speech must be "substantiated by evidence that the challenged statute is having an immediate and concrete effect." *Sanger*, 966 F. Supp. at 162. And further, the chill must be more than merely subjective. *See Laird v. Tatum*, 408 U.S. 1, 13–14.

Applicant Details

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Class Rank	**10%**
Law Review/ Journal	**Yes**
Journal(s)	**Law Review**
Moot Court Experience	**No**

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Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
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June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
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Dear Judge Sanchez:

I write to apply for a judicial clerkship with your chambers for the 2024 term. I am a graduate of St. John's University School of Law, where I ranked fourteenth in my class and was the Notes and Comments Editor for the *St. John's Law Review*. I am a second-year Associate with the firm Schulte Roth & Zabel. I would welcome the opportunity to learn from you.

My interest in a federal clerkship was sparked by David Dorsen's biography of Judge Henry Friendly. In particular, Judge Friendly's time clerking for Justice Brandeis has stuck with me. *Olmstead v United States* was before the court, and Justice Brandeis had decided to dissent, albeit narrowly. Yet Henry Friendly, clerking fresh out of law school, pushed Justice Brandeis to go further and write his now-famous theory of a right to privacy. I was drawn to Friendly's closeness to Justice Brandeis, proximity to impactful decisions, and ability to contribute to the chamber in which he served.

Building on this desire to serve the judiciary, I have participated in several judicial internships. During my 1L summer, I interned for Judge Raymond J. Dearie in the Eastern District of New York, where I prepared a draft opinion that involved the preclusive effect of § 301 of the Labor Management Relations Act. Then, I interned for the chambers of Judge Patty Shwartz in the Third Circuit, who provided me with the opportunity to make recommendations on *en banc* motions. And last spring, I interned in the chambers of Judge Nelson S. Roman of the Southern District of New York, who tasked me with drafting bench memos on pending motions. These opportunities to observe court proceedings, interact with clerks in chambers, and discuss cases with the Judges reaffirmed my strong desire to pursue a clerkship.

In short, what made these experiences deeply satisfying, and why I am interested in a judicial clerkship, is the chance they provided me to engage in challenging and novel legal work. I particularly enjoyed, and look forward to again, addressing different facets of the law. Further, through my numerous government internships—first for congressional members, then at the Westchester District Attorney's office—I experienced firsthand impactful public service, another important and independent motivating reason for why I am applying for this position.

Attached please find my resume, writing samples, letters of recommendation, and undergraduate and law grade sheets for your review. Thank you for your consideration, and I look forward to hearing from you.

Sincerely,

Paul A. Schochet

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EDUCATION

ST. JOHN'S UNIVERSITY SCHOOL OF LAW, Queens, NY
J.D., *cum laude*, June 2021
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Honors: Notes and Comments Editor, *St. John's Law Review*;
Alumni Scholarship; Dean's Award for Excellence in Constitutional Law, Torts, Drafting: Judicial Opinions National Security and the Law; Dean's List; 2019 Federal Scholars Award
Publications: *Arbitrating Security Class Actions: The Limits of Forum Selection Bylaws*, 94 ST. JOHN'S L. REV. 845 (2021)
Activities: *Teaching Assistant* to Professor Rosa Castello (Legal Writing); *Teaching Assistant* to Marc DeGirolami (Torts); *Member*, Federal Bar Association; *Mentor* to 1L class of 2022

UNIVERSITY OF DELAWARE, Newark, DE
B.A., Political Science, December 2016
Academics: Major GPA: 3.64; Cumulative GPA: 3.33
Honors: Dean's List (four of nine semesters)

EXPERIENCE

SCHULTE ROTH & ZABEL LLP, New York, NY
Associate, October 2021 – Present

SCHULTE ROTH & ZABEL LLP, New York, NY
Summer Associate, Summer 2020

HON. NELSON S. ROMAN,
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, White Plains, NY
Judicial Intern, February 2020 – April 2020
Drafted bench memoranda for a motion to dismiss a malicious prosecution claim for failure to state a claim upon which relief can be granted, insufficient service of process, and failure to comply with a court order. Turned bench memoranda into a draft opinion. Drafted bench memoranda about a motion to dismiss a breach of contract claim.

HON. PATTY SHWARTZ, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, Newark, NJ
Judicial Intern, December 2019 – January 2020
Assisted with research and writing tasks; analyzed rehearing petitions; cite and record checked draft opinions.

HON. RAYMOND J. DEARIE,
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, Brooklyn, NY
Judicial Intern, May 2019 – August 2019
Drafted pre-motion conference letter summaries regarding motion to remand for lack of subject matter jurisdiction and motion to dismiss for lack of personal jurisdiction. Drafted memoranda about the preclusive effect of § 301 of the Labor Management Relations Act, the unenforceability of contracts that artificially shorten federal statute of limitations, and municipal liability and equal protection §1983 claims. Edited draft opinions for clerks.

WESTCHESTER COUNTY DISTRICT ATTORNEY'S OFFICE, White Plains, NY
City Court Intern, September 2017 – December 2017
Summarized misdemeanor police reports; provided aid during arraignments; managed documents and updated files.

CONSTELLATION ADVISERS, LLC, New York, NY
C*ompliance Intern*, May 2017 – September 2017
Edited compliance manuals. Aided in preparing filings for Securities Exchange Commission review.

OFFICE OF UNITED STATES SENATOR CHRIS COONS (DE), Wilmington, DE
Legislative Intern, September 2016 – November 2016